EB 20 1986

Y4.P96/10:S.hrg.99-389

S. Hrg. 99-389

# THE DISADVANTAGED BUSINESS ENTERPRISE PROGRAM OF THE FEDERAL-AID HIGHWAY ACT

---

MF117 ORIGINAL
COMPLETED
470

## HEARING

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

---

NOVEMBER 19, 1985

---

Printed for the use of the Committee on Environment and Public Works

S. Hrg. 99-389

# THE DISADVANTAGED BUSINESS ENTERPRISE PROGRAM OF THE FEDERAL-AID HIGHWAY ACT

---

## HEARING

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

NOVEMBER 19, 1985

Printed for the use of the Committee on Environment and Public Works

U.S. GOVERNMENT PRINTING OFFICE
56-462 O
WASHINGTON : 1986

I

## COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ROBERT T. STAFFORD, Vermont, *Chairman*

JOHN H. CHAFEE, Rhode Island
ALAN K. SIMPSON, Wyoming
JAMES ABDNOR, South Dakota
STEVE SYMMS, Idaho
GORDON J. HUMPHREY, New Hampshire
PETE V. DOMENICI, New Mexico
DAVE DURENBERGER, Minnesota

LLOYD BENTSEN, Texas
QUENTIN N. BURDICK, North Dakota
GARY HART, Colorado
DANIEL PATRICK MOYNIHAN, New York
GEORGE J. MITCHELL, Maine
MAX BAUCUS, Montana
FRANK R. LAUTENBERG, New Jersey

BAILEY GUARD, *Staff Director*
LEE O. FULLER, *Minority Staff Director*

---

### SUBCOMMITTEE ON TRANSPORTATION

STEVE SYMMS, Idaho, *Chairman*

JOHN H. CHAFEE, Rhode Island
JAMES ABDNOR, South Dakota
ROBERT T. STAFFORD, Vermont

QUENTIN N. BURDICK, North Dakota
GEORGE J. MITCHELL, Maine
LLOYD BENTSEN, Texas

# CONTENTS

## OPENING STATEMENTS

Page
Burdick, Hon. Quentin N., U.S. Senator from the State of North Dakota .......... 5
Stafford, Hon. Robert T., U.S. Senator from the State of Vermont .......... 4
Symms, Hon. Steve, U.S. Senator from the State of Idaho .......... 1

## WITNESSES

Bass, Ray D., director, State of Alabama Highway Department .......... 19
  Written statement .......... 192
  Response to additional questions .......... 199
Buesing, Gerald, president, Buesing Corp., representing the Associated Builders and Contractors .......... 35
  Written statement .......... 280
Crampton, Susan, secretary, Vermont Agency of Transportation .......... 16
  Additional testimony .......... 164
Hirschman, Robert E., immediate past chairman, American Road & Transportation Builders Association, accompanied by Daniel J. Hanson, president, ARTBA and Cordell M. Parvin, attorney, Roanoke, VA .......... 32
  Written statement with attachments .......... 225
Johnson, Mary A., chairman, WBE committee, the National Association of Women in Construction .......... 27
Joseph, Charles, Charles Joseph Co. .......... 42
  Written statement .......... 310
Laducer, James K., director, North Dakota Minority Business Enterprise Programs, United Tribes Educational Technical Center .......... 54
  Written statement .......... 359
  Responses to additional questions .......... 361
Marquez, James S., General Counsel, Department of Transportation, accompanied by Dave Lukens, Special Assistant to the Administrator, Federal Highway Administration .......... 11
  Written statement .......... 78
Martinez, Michael, AMI, Inc. .......... 45
Miller, Fred D., director, Oregon Department of Transportation, representing the American Association of State Highway and Transportation Officials .......... 15
  Written statement .......... 95
  Results of a survey on impacts of 10 percent minority business requirement .......... 106
  Responses to a questionnaire .......... 145
Mitchell, Hon. Parren, a Representative in Congress from the State of Maryland .......... 5
  Written statement .......... 61
Morse, Donald H., contract administration supervisor, Idaho Transportation Department .......... 52
  Written statement .......... 348
Roehm, Jeff, president, traffic service division, American Traffic Safety Services Association, Inc., accompanied by Robert Garrett, executive director .......... 50
  Written statement .......... 340
Rojas, Roberto Cevera, director, National Hispanic Association of Construction Enterprises .......... 29
  Written statement .......... 214
Stuttard, S. Margaret, Contractor's Traffic Control, Inc., representing the Association of Business and Professional Women in Construction, Pennsylvania Chapter .......... 44

Page
Rojas, Roberto Cevera, director, National Hispanic Association of Construction Enterprises—Continued
    Written statement ..... 321
Supica, James W., president, United Construction Co., Inc., chairman, highway division, Associated General Contractors of America ..... 37
    Written statement ..... 293
Thomas, Ralph C., III, executive director, National Association of Minority Contractors ..... 25
    Written statement ..... 207
Vande Velde, John C., vice president, Warning Lites of Illinois, Inc., and president, United Subcontractors of Illinois ..... 48
    Written statement ..... 328
Watts, Alfred D., director, office of fair practices, Maryland Department of Transportation ..... 57
    Written statement ..... 369

## STATEMENTS SUBMITTED FOR THE RECORD

Andrews, Hon. Mark, U.S. Senator from the State of North Dakota ..... 377
    Attachments to Senator Andrew's statement:
        Dakota Fence Co. ..... 378
        Associated General Contractors of North Dakota ..... 381
Collins, Hon. Cardiss, a Representative in Congress from the State of Illinois ..... 384
States of:
    Alaska ..... 389
    North Dakota ..... 392
    Pennsylvania ..... 404
    South Dakota ..... 412
    Texas ..... 415
Castle Construction Corp ..... 420
Certified Traffic Controllers, Inc ..... 433
Directions Metropolitan, Inc ..... 434
Flasher Barricades ..... 441
Idaho Construction Co ..... 3
Illinois Association of Women Contractors ..... 445
Kress Contracting Co ..... 446
Pavement Specialists, Inc ..... 447
Southern Illinois Contractors Association ..... 449
Statewide Transportation Alliance of Associations ..... 455

# THE DISADVANTAGED BUSINESS ENTERPRISE PROGRAM OF THE FEDERAL-AID HIGHWAY ACT

---

TUESDAY, NOVEMBER 19, 1985

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON TRANSPORTATION,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10:02 a.m., in room SD-406, Dirksen Senate Office Building, Hon. Steve Symms (chairman of the subcommittee) presiding.

Present: Senators Symms, Stafford, Abdnor, and Burdick.

## OPENING STATEMENT OF HON. STEVE SYMMS, U.S. SENATOR FROM THE STATE OF IDAHO

Senator SYMMS. Good morning.

The committee will come to order.

We have a very ambitious schedule this morning. There are over 19 witnesses who have come from far and wide to testify. I will say at the outset to everyone who is on the witness list to testify this morning that your entire statement will be part of the record. We would appreciate expeditious testimony, although it is not the Chair's wish to cut anyone short. We want everyone to feel like they have had an opportunity to say what they came here to say. The Senate is in session and I will apologize in advance to the witnesses as some of us leave to go to the floor. We will all carefully peruse the record so that we know what has been said. So we will probably have to be going back and forth to the floor, but there will be other Senators who will come later.

I first want to welcome everyone this morning to the Transportation Subcommittee hearing on the Federal-Aid Highway Program for Disadvantaged Business Enterprises, the DBE program.

On May 30, 1985, Brad Reynolds, the Assistant Attorney General for Civil Rights wrote a letter to Jim Marquez, the general counsel of the U.S. Department of Transportation—I believe Jim is here today and is intending to testify on behalf of Secretary Dole—regarding the operation of disadvantaged business enterprises, the DBE Program.

I would like to insert the entire letter in the record following my opening statement. In that letter, Mr. Reynolds makes the following assertion:

> The purpose of the DBE program was to provide minorities with an equal opportunity to compete in the construction industry.

I believe Mr. Reynolds has accurately characterized the intent of most Members of Congress who approved section 105(f) when they voted for the Surface Transportation Act of 1982. We are here today to determine whether the law has had its intended effect.

There is overwhelming support in Congress to open the door of opportunity to enterprising men and women whose race, ethnic background, physical handicap, or gender may have placed them in an economically disadvantaged position. I strongly encourage such congressional action because I believe that any individual or group effort to achieve greater economic status invigorates our economy, and ultimately strengthens our democratic political institutions.

There remains strong disagreement, however, both in the Congress, and in the public at large regarding the proper means to achieve this worthy goal. The 105(f) program is one means to achieve that goal, and it is the committee's responsibility to review the implementation and effects of this program with the aid of the witnesses which we have called here today.

If the evidence we gather here and in the future indicates that section 105(f) has encouraged greater participation by minority contractors in the Highway Program and helped to place those contractors on a competitive footing with other nonminority contractors, then this Senator will support reauthorization of the DBE Program. If, on the other hand, the evidence indicates that State transportation departments have used section 105(f) to establish a quota system for the award of contracts on Federal-aid highway projects, then I will work to ensure that this provision of the law is either eliminated or substantially modified when Congress considers legislation to reauthorize the Highway Program.

As Members of Congress consider this provision of the law, we must ask, is it our purpose to provide minorities with an opportunity to compete in the construction industry, or is it our purpose to establish a system of discrimination in which bids may be rejected out of hand based solely on the color of the contractor or the subcontractor's skin. That is a question that I think we all have to think about.

I believe most Members would find the latter proposition repugnant and clearly it would be repugnant to the constitutional guarantees of due process and equal protection under the law. The testimony of all the witnesses here today will help us determine whether section 105(f) is an equal opportunity program or a federally sanctioned system of racial and ethnic discrimination.

I believe we have a balanced program of witnesses and I look forward to hearing their testimony. I especially want to welcome Donald Morse from the Idaho Department of Transportation and I want to insert in the record, at the conclusion of my opening remarks, a letter written to me by an Idaho construction contractor who has worked with the DBE Program.

I am delighted that the former ranking member of this subcommittee, and the chairman of the full committee, Senator Stafford, is with us. He has a long and distinguished record of being concerned, not only about civil rights, but about the highways that transport us around this Nation.

[The letters referred to by Senator Symms follow:]

U.S. DEPARTMENT OF JUSTICE,
CIVIL RIGHTS DIVISION,
*Washington, DC, May 30, 1985.*

Mr. JAMES MARQUEZ,
*General Counsel, U.S. Department of Transportation,*
*Washington, DC.*

DEAR MR. MARQUEZ: This letter is in reference to a letter you received from Mr. Alfred W. Crump, Jr., on April 10, 1985, regarding the Disadvantaged Business Enterprise (D.B.E.) program of the Surface Transportation Assistance Act of 1962 (STAA). I share his concern about the operation of that program. Section 105(f) of the STAA, authorizes that 10% of the monies appropriated be allocated to small businesses owned by socially and economically disadvantaged persons. The purpose of the D.B.E. program was to provide minorities with an equal opportunity to compete in the construction industry. In reality, Section 105(f) has too often been misapplied to provide minority subcontractors an unfair competitive edge over non-minorities, thereby discriminating against those subcontractors not legally considered a minority. As you know, the Constitution precludes application of Section 105(f) in such a race-conscious manner.

The situation which Mr. Crump described for you with regard to the Carl M. Weber Steel Service well illustrates the ruinous effects that the D.B.E. Program can have upon individual businesses. This result is especially unpalatable where there has been no discrimination on the part of the business being penalized. As Mr. Crump's letter also points out, the practical results of this provision is that an employer would be better off economically by having actually discriminated and subsequently been ordered to implement an affirmative action hiring and promotion plan. As it is, the very existence of businesses are threatened by the inability to effectively compete. Needless to say, the social cost of set-asides is also great. Our economy as a whole must absorb hidden as well as actual costs generated by the inefficient allocation of resources. Thus, there is no valid economic or legal basis for a racially discriminatory allocation of STAA funds.

Since the Department of Transportation is charged with insuring that the statutory program conforms to Constitutional and legal mandates, I urge you to take an active look at this situation. We, too, are reviewing Mr. Crump's allegations closely to determine whether Justice intervention might be warranted as well.

Thank you for your attention in this matter.

Sincerely,

WM. BRADFORD REYNOLDS,
*Assistant Attorney General,*
*Civil Rights Division.*

---

IDAHO CONSTRUCTION CO.,
*June 21, 1985.*

Re consideration of 1986 Suface & Transportation Act, Disadvantaged Business Enterprise Program.

Senator STEVE SYMMS,
*P.O. Box 1190,*
*Boise, ID.*

I am writing to you as a citizen and a contractor of my dissatisfaction with the stipulations and regulations of special interest groups into Congressional legislations, particularly Section 105 F of 1982 Transportation Act, which places untold burden on the majority for the special interest of a few. Senator Symms, the entire DBE program is getting out of hand. Civil Rights in one thing but I do not believe it was meant to do what it has now evolved. Though Reverse Discrimination is getting to be an old phrase, it is definitely a correct statement when used in context of the DBE program. As being a contractor with Idaho Construction Company, and being involved directly with the program, it is a falsehood that the program is working. It's really a system of conniving, scheming, and manipulation with contractors trying to meet stipulated quotas. Work needs to be performed because you're interested, capable and willing to learn rather than predicated to the fact you are a minority. To deny someone of work or subcontracting when they are capable and competitive because of race, etc. is blatant prejudice. Being required by law to give someone work or subcontracting even though they are not competitive, capable or interested but because they are a minority is just as wrong, and let me tell you that very thing is happening. In bidding work, we hardly even solicit work from nonminority contractors. We can't use them even if they did because we then can not meet our quotas. We will not be in compliance and will not be awarded the job even if we are the low bidder. It is not right when the system is not working, while the Federal Bureaucracy just is simply placing more and more of the burdens of government regulations upon the contractor. The contractor is always under the threat of "non-compliance". It's hard enough to be a contractor in todays market place without the non-construction worries that are heaped upon us. The market place is no longer competitive.

One of the biggest problems in the DBE program is the lack of consistency with its implementation. We are an Idaho Bridge Contractor but also do work in surrounding States. Within Idaho, one district might interpret and require certain things to be done while another might require something quite differently. When you work in another State, they accept little of what you've done in the other States and you do it all over again for them. It's just a large complicated mess resulting in unnecessary time, effort, money and harrassment.

It seems that the main intent is to establish any minority person who wishes to be a contractor granting him or her the special efforts and benefits of the government and does nothing for the non-minority who wishes to become a contractor.

That is discrimination and it is created by the DBE program.

In summary, Senator Symms, this country was founded upon the principles of fairness and hard work to achieve and succeed; not because someone (in this case, government) is handing you something special because you are a minority or special interest group. We are no longer a Country of Americans but a Country of special interest groups. Each polorized into our own little interests with all types of barriers and discrimination to others outside the particular group. The DBE program is separating people and not bringing them together, and creating a lot of hard feelings.

As a citizen and taxpayer, I see this program as heavy liability upon many for the special interest of a few. People of Idaho and the rest of the Country need to be aware of the tremendous amounts of money this program alone costs the taxpayer under the disguise of equal rights. In your recent phamplet "Report Card" you answered a student from Fruitland High School that "runaway federal spending is your major concern." I, therefore, ask you to carefully consider the special interests, particular the DBE program that ended up being added to the Federal Highways Appropriation and ask you to resist those efforts. Our government is fast losing its credence with its people. We are all becoming servants to government rather than the government for the mutual benefit of all.

Our company or any other contracting company, would be more than willing to inform you as to the problems within the contracting market place as a result of "heaped on" regulations and stipulations by governmental bureaucracy.

Thank you for your time and consideration.

Sincerely,

ROGER LAUGHLIN,
*Idaho Construction Co.*

Senator **SYMMS**. Senator, do you have an opening comment to make?

## OPENING STATEMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator **STAFFORD**. Thank you, Mr. Chairman, I do have a very brief comment.

I am very pleased that you have scheduled this Subcommittee on Transportation hearing today on the Disadvantaged Business Enterprise Program as it applies to the Federal-Aid Highway Program.

Section 105(f) was included in the Surface Transportation Act of 1982, as you pointed out, and we have now had several years of experience with this program. It is appropriate for this committee to review the program at this point to determine if any improvements can be made.

I believe that the section 105(f) program should be continued, assuming that the evidence in front of the committee so indicates, to ensure equal opportunity for women and minority contractors.

I am also aware of concerns that have been raised about the program. The committee will carefully review the 105(f) program to determine if any changes are appropriate to prevent the misuse of it.

I want to welcome the witnesses who will be testifying before the committee today. I know that the information they will provide us will be very beneficial to this subcommittee and to the full committee in deliberating on this subject.

I particularly want to welcome a witness who will be testifying and who happens to come from the great State of Vermont. As you know, Mr. Chairman, I learned to be a little bit parochial from our late chairman, Jennings Randolph, when he was heading this committee.

Susan Crampton will be representing the Vermont Agency of Transportation, and I particularly wish to welcome her here today.

Thank you, Mr. Chairman.

Senator SYMMS. Thank you very much.

[An opening statement from Senator Burdick follows:]

### OPENING STATEMENT OF HON. QUENTIN N. BURDICK, U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Over the past year, I have received considerable correspondence from non-minority contractors on the adverse impact of Section 105(f). In prior hearings, held in July, we received testimony that 105(f) has resulted in significant economic dislocation for speciality contractors and the "lack" of legitimate minority businesses has resulted in front operations.

Today's hearing will provide a forum for both sides to address these issues, as well as other specific concerns. Unless 105(f) is included in the reauthorizing legislation it will lapse at the end of this current fiscal year. Based on conflicting statements so far, I am sure that this will prove a difficult issue for the Committee to resolve satisfactorily for interested parties. I would like to thank today's witnesses for agreeing to testify before us today to provide us first-hand information on the positive and negative aspects of 105(f).

Senator SYMMS. Now we welcome to the committee our first witness, who I think both Senator Stafford and I had the privilege to serve with in the House of Representatives in years past, the Honorable Parren Mitchell, U.S. Representative of the Seventh District of Maryland.

Parren, welcome to the committee. We look forward to your testimony.

### STATEMENT OF HON. PARREN MITCHELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Representative MITCHELL. Thank you very much, Senator Stafford and Senator Symms. I will bear in mind your admonition about the number of witnesses that we have, and the fact that you are in session, and I will try to move as briefly and concisely as I can.

Seated to my left is Ms. Gloria Bryant, who is on the staff of the House Small Business Committee. She is the chief investigator who has been going out reviewing these programs.

Seated to my right is Major Clark, my chief of staff on the House Small Business Committee.

I would ask unanimous consent that my testimony in its entirety be submitted for the record.

Senator SYMMS. Without objection, so ordered.

Representative MITCHELL. At the very outset, let me say that I strenuously object to Mr. Bradford Reynolds approach to this problem. I hope to spell out why he is wrong in my testimony.

I introduced the amendment to the act, and obviously I did it because I felt there was a need for legislation of this nature to ensure the participation of small disadvantaged business in a massive public spending program. To date, the subcommittee which I chair, that is the Subcommittee on SBA and SBIC, Minority Enterprise and General Small Business Problems of the House, has investigated 16 DBE programs and received testimony from 15 States and the District of Columbia regarding the implementation of section 105(f).

The investigation is ongoing and it has already spanned a 19-month period.

Obviously, the purpose of each investigation was to collect information and statistical data from each State and the U.S. Department of Transportation that will reflect and help us to gauge how section 105(f) is being implemented.

The recent barrage of criticisms aimed at this 10 percent provision by the Associated General Contractors of America by Mr. Ray Barnhart, the Administrator for the Federal Highway Administration, in my opinion, is totally wrong and unwarranted.

The criticisms of the program are without substance, in light of the fact that neither Mr. Barnhart nor the AGC has conducted a statistically sound impact study of the implementation of section 105(f). As a matter of fact, much of this kind of program was in effect as early as 1980, and we heard no major criticisms even before the passage of the Surface Transportation Act.

I do want to make it very clear that those who challenge these affirmative efforts would have us believe that all preference programs are just wrong, are illegal. But preference is not illegal. Invidious preference is illegal. If the term "preference" is construed to mean the allocation of benefits by the Government to a predetermined class of eligibles, then the Constitution may be validly interpreted as prohibiting both unreasonable allocation of those benefits and the allocation of benefits to achieve other than a legitimate Government purpose.

We do this all the time in terms of preferential treatment. The Buy American Act, that is a preference. We certainly do it in terms of Federal contracts under which we give extraordinary contractual relief to essential defense contractors. We permit, under our tax laws, preferential treatment to defense contractors to postpone the payment of Federal taxes until the completion of a defense system.

I would argue that the idea of preference is certainly not unusual nor inimical to the process of the American system of government. On the other side, we have the sanctions that prevent monopolistic and anticompetitive practices, which, in my opinion, effectively thwart the free enterprise system.

In order to assess the constitutional validity of these measures, we have to ask two questions, only two. Do these laws address a legitimate Government purpose? Are these laws an appropriate or reasonable means to address that legitimate purpose?

The record is abundantly clear with regard to the exclusion of minorities from major segments of our economic system. I think that it is the sense of the House and the Senate that this exclusion, based solely upon race or ethnic identification, is wrong.

If the purpose of the Buy American Act is to preserve the domestic mobilization base, can anyone honestly conclude that the Congress lacks the constitutional power to address that legitimate purpose of Government. That is essentially what we are doing in terms of section 105(f).

Let me skip along a little bit, and I will digress from my testimony for just a brief moment.

The harsh reality is that because of budget deficits and a whole lot of other factors, we are destroying a number of programs that were beneficial to the poor of this Nation and to minorities. I think that is inevitable. I don't think that we can stop it. But I would argue as fervently as I can, if you are going to do that, then leave us a viable option, those of us who are black and Hispanic and minority of any type, and women. Leave us a viable option, and that option, it seems to me, is the development of an effective, viable, entrepreneurial system.

You just can't end all efforts on the one hand, and not give us a mechanism by means of which we can attack our own unemployment, and by means of which we can raise revenues from the Federal Government.

So I see this as the next logical sequential step really, the economic development of minorities, the next logical sequential step following the civil rights decade and civil rights legislation.

A number of questions were addressed to me and I will try to respond to them as briefly as I possibly can. One question was: What is the capacity for disadvantaged business enterprises and minority enterprises for highway construction?

If by capacity, you are raising the question: Are there sufficient numbers of minority contractors? You must remember that meeting the goals is not solely contingent on the size of the minority population of a given State, but rather on how the contracts are awarded.

For example, Senator Stafford, in your State, with a small minority population, the State is meeting and exceeding its goals by awarding prime contracts. That is the way to do it if you don't have enough of the other. The same thing is happening in Wisconsin and in Idaho. In the State of Idaho, for example, they are meeting the goals despite a very small minority population.

I would also caution that the DBE participation is not limited to just highway construction projects. The enabling legislation indicated that minorities can be used in any fashion related to highway construction. The law authorizes use of attorneys, the banks, communications outlets, accounting experts, and food to workers. All of these can be counted; so you need not limit work to construction work.

You asked how many DBE's and women business enterprises are bidding as prime contractors for highway construction work, and how many more can be developed as prime contractors.

Just a moment ago, I alluded to your State, Senator, where you do have primes. The high dollar volume of contracts awarded prevents some DBE's from bidding as primes, but since the implementation of section 105(f) some States such as Idaho, Pennsylvania, and Wisconsin have addressed this concern by breaking out contracts into portions that allow DBE's to bid as prime contractors. That is a sensible and logical approach.

Another question was: What effect has the section 105(f) program had on nonminority specialty contractors and WBE's? If there have been any adverse effects, how should they be addressed?

As of today, there are no official data available on the impact of section 105(f) on nonminority specialty contractors nor has there been any valid or objective assessment of such an impact.

Let me quickly add that this is not to say that there have not been allegations of a negative impact of section 105(f) on nonminority specialty companies. But if there has been a negative impact, it is not the result of this legislation, but rather the result of how some States have been and continue implementing the program, and how some prime contractors subcontract portions of the project.

Let me say that this is certainly not a national problem. It is not happening in all of the States. It is not happening in those States that have been innovative in administering the program.

Let me just cite a bit of history. In 1980, the then Under Secretary of the U.S. Department of Transportation, Secretary Goldsmith, had a project going wherein States were submitting MBE goals to the Department of Transportation. This was long before the Surface Transportation Assistance Act and section 105(f); there was no indication that this program was having a negative impact on nonminority specialty firms.

I think to understand how specialty firms, a few of them, might be construed as being negatively impacted upon, you must take into consideration that specialty work fluctuates from year to year, depending upon State requirements and project locations. There are great variations.

There have been some allegations that this has been a problem. The State of Pennsylvania, the State of Wisconsin, are two States that have taken preventive measures to address these concerns. The way it is being done is to work hard to expand the DBE's skills in other than specialty areas, through a mentor-protege program.

Senators, I am confounded and confused when the Association of General Contractors points out that section 105(f) is taking work away from its members. I am confused because in the AGC construction publication dated December 1984, page 22, it says that in 1984 highway contractors experienced close to a 30-percent increase in work volume over 1983. Moreover, the AGC projects a 14.3-percent increase in 1985. So in the last 2 years alone, the members of the Association of General Contractors experienced a 44-percent increase in work because of the Surface Transportation Act.

So, on the one hand, they report that this legislation is driving their members out of business and, on the other hand, in their official report, this legislation has resulted in an increased work volume.

Let me try to respond very quickly to one or two other questions.

The fourth question raised was: What kind of certification process for DBE and MBE firms should be required? Should the process be uniform for all States?

My preference is, and I have made very, very strong arguments to this effect, for uniform guidelines for certification. I think that would make sense—minimum uniform guidelines for certification. Some States may have some peculiarities that would prevent them from conforming to a uniform certification process, but I think that this is desirable.

Another question was: What kind of training, financial or other technical assistance is needed by DBE and WBE firms? Should this kind of assistance apply toward the 10-percent goal?

The answer is no to the latter part. It should not qualify. With reference to the former part, the first part of the question, I am constantly renewed spiritually when I see some States making the maximum effort to help DBE's.

They were aware of the cash problems. They were aware of the bonding problems. They were aware of a number of problems. Many, many States have launched ambitious and significant programs to facilitate the development and the strengthening of DBE's. Marketing assistance is provided by some States.

We now come to a question that has been raised very often. What, if any, additional costs do the DBE and MBE programs add to the Federal Highway Program?

Federal contracting regulations provide that the prime contractor is to accept the lowest responsive bid. All States are given a fixed amount of funds for construction activities. The amount does not fluctuate with the requirements of 105(f). Also, the State's engineering costs serve as a guidepost for the cost of the projects, and most States will not exceed that guidepost.

There was a study done by Mr. ABT on the impact of MBE set-aside requirement on the local public works program of 1977; it was discovered that the cost impact to the Government was estimated to be 1.3 percent, which is about equal to increases attributed to Davis-Bacon. Above and beyond that, you place those cost increases alongside the additional revenues that come to the Federal Government because of DBE and women business enterprise participation, and the additional revenues offset that 1.3 percent cost.

Finally, let me get to the seventh question that you raised. Question No. 7 made reference to any experience that I might have had with firms that do not appear to be legitimate firms. How can the fraudulent use of this program be prevented?

No. 1, and I want to make the record very, very clear. I hate and despise front firms. I think that they are absolutely despicable, and I think that they stain the program, which is of significant benefit.

Based on information provided by the States at each of the oversight hearings conducted by my subcommittee, front company abuse has been kept to a minimum. Many States have strong certification procedures which enable them to weed out ineligible firms right at the outset.

There is no evidence to support allegations of widespread fraud in the program. If there were, why are there not criminal prosecutions by the Justice Department and by the States? We have found one or two prosecutions, and I am glad that these people are being prosecuted. On the other hand, if there were widespread fraudulent abuse of this program, I would expect that, if the Justice Department is carrying out its duties, it would be in court constantly.

I am aware of the problem. I am aware of the danger of it, and toward this end, I introduced legislation, H.R. 1961, which has been passed by the House and incorporated in bill H.R. 3500. My legislation would increase the dollar amount of the fine for front companies from $5,000 to $50,000, and lengthen the term of imprisonment from 2 years to 5 years for those found guilty of front operations.

Finally, let me just respond to your last question, No. 8. How have States with small minority populations been able to meet DBE requirements?

Please remember, Senators, meeting goals is not solely contingent upon the size of the minority population of a given State, but rather on how contracts are awarded. Again, I would reiterate that in some States, such as yours, Senator, with a very small minority population, you have achieved fuller participation by using some of your minority contractors as primes, and you have done the same thing. That is a sensible and logical answer.

Let me conclude by saying what I've said; Senators, you can't have it both ways. You can't begin to destroy all of those programs that have proved beneficial to minorities over the last 15 or 20 years without putting something else in their place. The logical thing to put in place is a program, a systematic, significant legislative program to enable the development of entrepreneurship.

I want to see the legislation end. I would love to see us not have a situation in which we would require a 10-percent set-aside. But I don't see that happening at any time in the near future. In the State of Mississippi, before the 10-percent set-aside, as I recall the figure, minority and women participation was less than 1 percent. In Mississippi, it is now 11 percent. We can cite a litany of States that have moved from 1 percent to at least 10 percent. When this Nation advances to what I think it ought to be, then there will be no need for this kind of effort. But until we get there, there is a demonstrable need for 105(f) or something similar to it in terms of preferential treatment.

I thank you for letting me make my statement. I will gladly respond to any questions that you might have.

Senator SYMMS. Thank you very much.

Senator Stafford.

Senator STAFFORD. I congratulate the member on his very good statement. I have no questions at this time.

Senator SYMMS. Thank you very much, Congressman. You basically have answered all of my questions. I appreciate your statement, and I appreciate your being here this morning.

Representative MITCHELL. Thank you. If at any time, either of you decides to leave the Senate, the door to the House is always open to both of you.

Senator SYMMS. The next witness is James S. Marquez, general counsel, U.S. Department of Transportation.

Mr. Marquez, go right ahead.

## STATEMENT OF JAMES S. MARQUEZ, GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY DAVE LUKENS, SPECIAL ASSISTANT TO THE ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION

Mr. MARQUEZ. Thank you, Mr. Chairman, and good morning, Senator.

First of all, let me apologize if my voice disappears, because I have something in my throat.

It is a pleasure for me to be here. I am accompanied this morning by Dave Lukens with the Federal Highway Administration. I have submitted about a 17-page statement, and I would simply like to summarize that this morning in very brief form, and make ourselves available for questions as you so desire.

Let me thank you for inviting us to appear this morning. My statement will basically follow the questions asked in your letter, and without reading the questions, I will just proceed.

In terms of capacity, individual States have set DBE goals ranging anywhere from 5.5 to 14 percent and WBE goals ranging from 0.05 to 5 percent over the past 2 years the States generally have achieved these goals. This may give you a rough measure of DBE capacity.

In situations where DBE's and WBE's are not available to work on a particular contract, we ask the States and the prime contractors to document thoroughly the reasons for their unavailability. We view the DBE program as one that is intended to provide opportunities to develop capacity, as well as working with existing DBE's. Consequently, what happens is that capacity is ever changing as new DBE's are established.

In terms of participation and development of DBE's and WBE's as prime contractors, there currently are over 466 DBE's and 205 WBE's that are bidding as prime contractors for highway construction work. Because participation in prime highway contracting involves very large capital investments, complex financial arrangements, and technical expertise, DBE and WBE firms have in most cases entered the industry through subcontracting.

The effects of the DBE program on non-DBE specialty contractors and WBE's is a subject that has received considerable attention. The Federal Highway Administration [FHWA] has received in the past year considerable correspondence from non-DBE specialty contractors and other firms who complain that the DBE requirements are forcing them to lose business or are even driving them out of business.

This correspondence alleges that non-DBE specialty contractors with lower bids than DBE's are denied contracts. It is difficult to judge fairly the weight which should be given to individual complaints of adverse impact given the overall efforts of the STAA which did increase total contract dollars and opportunities by 50 percent.

Women business, if socially and economically disadvantaged, can qualify on an individual basis under the statutory program. That program, as you know, has left unchanged the existing DOT regulatory program requiring good-faith efforts for WBE's. We, at the Department, remain committed to the WBE program, and intend

BEST COPY AVAILABLE

to continue encouraging the States to take affirmative, nondiscriminatory steps to increase participation of WBE's in federally assisted work.

In terms of the DBE and WBE certification process, the Department, through regulations, provides minimum standards which all States must follow in certifying DBE and WBE firms. Consistent with the concept of a federally assisted State administered highway program, we do believe that the primary responsibility for certification remains with the States.

We believe as well that the screening programs undertaken by the States are effective in preventing front firms from taking advantage of the program.

In terms of technical and financial assistance to DBE's and WBE's, we have found that most such firms, like any new emerging firms, are in need of technical assistance, as well as bonding and financial assistance. We have taken various initiatives to help address that problem, and the FHWA does have supportive services for emerging companies.

In addition, the Department has 14 program management centers and one Native American business enterprise project that is run by the Office of the Secretary. We have bonding and short-term loan programs through the Firemen's Fund Insurance Co. and the Atlantic National Bank.

You asked about additional costs resulting from DBE programs. State certification and technical assistance programs have staff and other operational costs as do the Federal technical assistance and oversight efforts.

There have also been allegations that prime contractors have awarded subcontracts to DBE's in order to meet contract goals, even though the DBE quotes were higher than non-DBE competitors. It is hard to tell how pervasive a problem this may be, or what, if any, effects it has had on overall program costs.

With reference to fronts and their prevention, we continue to believe that enforcement of the DBE Program's eligibility requirements through effective screening programs at the State level is a key part of ensuring that the program will achieve its purpose.

The Department maintains a certification appeals process for firms that believe they have been wrongly denied certification or wrongly decertified by recipients of DOT funds, and for persons who believe that recipients have mistakenly granted certification to a firm.

The Department's inspector general's office is often called upon to independently investigate matters related to DBE certification. Some Federal and State investigations of program abuse have resulted in referrals for criminal prosecution.

In those States with a small minority population, the question has been raised by the subcommittee as to how those States could enhance their ability to meet DBE requirements. The Department's regulations require only that a State set a reasonable goal. Small minority population within a State has been accepted as one factor justifying a goal of less than 10 percent. Four States have requested goals of less than 10 percent for fiscal year 1986. Of these three have been approved and one is pending.

With reference to a study of the 105(f) program and its impact, I should advise the committee that FHWA at the present does have a study underway. We are expecting the results of that study in January 1986. The purpose of that study is to assess the impact, both positive and negative of the 105(f) program.

With that, Senators, we will open ourselves up for questions.

Senator **Symms**. Thank you very much.

Are there any specific statutory changes in section 105 that the Secretary may be considering as part of the administration's highway reauthorization legislation?

Mr. **Marquez**. At the present time, Senator, the 105(f) provision of the statute is under consideration and review at the Department. At this particular time, the Secretary has not made a final policy decision on what we will do with reference to 105(f). We hope to do that in the near future.

Senator **Symms**. I note that in your testimony you said,

> Thus, complaints assert that 90 percent of an average highway construction contract stem from the prime contractors, leaving 10 percent for subcontractors. As a result many claim that non-DBE subcontractors are shut out from bidding opportunities.

Is this a problem that you are looking at, and looking at very carefully?

Mr. **Marquez**. We are looking at it, Senator.

Senator **Symms**. We end up getting reverse discrimination.

Mr. **Marquez**. That is the allegation, yes, sir. As a matter of fact, we are in litigation in the State of North Carolina on that very specific issue at the moment. We are reviewing the allegations and, hopefully, this study which is being performed by the FHWA, through the ABT Associates in Cambridge, MA, will have some data on which we can rely in January 1986 to address that allegation.

Senator **Symms**. Do you think that it is advisable for Congress to establish uniform certification standards by which the States must qualify the DBE's and WBE's?

Mr. **Marquez**. I don't work on a daily basis with the certification process. However, I think that the efforts that the Highway Administration has been making toward developing uniformity within the regulations of the Department of Transportation would be sufficient.

At this point, my initial reaction is that it wouldn't be necessary for statutory requirements.

Senator **Symms**. Recently, Mr. Barnhart sent a letter to his regional administrators in which he said, and I will quote: "Some States seem to totally ignore the good faith effort provision of the law," and he continually receives complaints that "the low bidders who have not achieved the specified goals in their bid submittals are automatically rejected as being nonresponsive."

Are there States which ignore the good faith effort provision in contract bids, and if so, what has been done to correct it, or has anything happened since the Administrator sent the letter out?

Mr. **Marquez**. I will let Mr. Lukens answer that since he is more familiar with it than I.

Mr. **Lukens**. As part of that memo to our field offices, Mr. Barnhart instructed our regional administrators to take a look at States which are attempting to reject low bids. We had a 6-month survey which showed States have rejected 122 bids that were low. Either they have gone to readvertisement, or they were awarded to the second low bidder.

His instruction has put our field people on notice that if they are confronted with this situation, they are to analyze it to make sure that the State has followed the regulations in looking at good faith efforts. If a State has not, we will not participate in the project or the readvertisement.

Senator **Symms**. So the answer is that you are making headway.

Mr. **Lukens**. Yes.

Senator **Symms**. You are satisfied with what is happening.

Mr. **Lukens**. It is too soon after that memo to really get a good handle on it, but we are monitoring it very closely.

Senator **Symms**. Senator Stafford.

Senator **Stafford**. Thank you, Mr. Chairman.

Mr. Marquez, what criteria should be used to determine good faith efforts for both the State and the contractors?

Mr. **Marquez**. Can I again ask Mr. Lukens to answer that question.

Mr. **Lukens**. It is very difficult to really give a very definitive answer. It is very subjective, and given different people's impression of what constitutes a good faith effort, I am not sure that the Congress, or FHWA, or anyone else could give absolute guidelines.

It is a moving target. We have worked with the States in this area. Frankly, we have come across some cases where the contractors missed the goal by perhaps one-tenth of 1 percent, and the State has been unwilling to take a look at that, and are going to award to a second low bidder. We believe that within one-tenth of 1 percent of the goal is probably a good faith effort.

There have been other cases where there is a contract goal of 10 percent, and a contractor comes in with 1 percent, and other contractors come in with 8 percent. That doesn't necessarily constitute good faith efforts—so it is a mixed bag.

Senator **Stafford**. Are there any areas where States could improve their record-keeping of DBE and WBE information. For example, contractors have stated that it is difficult to identify available minority firms who do highway construction work from some of the State directors. What is your comment on that, or would you prefer to comment in writing?

Mr. **Lukens**. I think that we would like to provide that for the record.

[The following information was subsequently supplied:]

Departmental regulations require grant recipients to maintain such directories. From our experience in conducting in-depth reviews of various state DBE and WBE programs, we have found that the states have generally improved their directories of certified DBEs and WBEs. Some have detailed computer print-outs that are updated on a daily basis. In some states, the DBE's and WBE's are listed geographically with their area(s) of expertise, bonding capacity, equipment inventory, and a record of past performance. There is no uniformity nationwide in the directories. However, we believe the directories are a tool primarily used by the states and contractors, and they are in the better position to design the directory format and type of information contained to suit their individual needs. We will continue to monitor the situation to assure that the directories are used in the most effective way.

Senator **Stafford**. Mr. Marquez, when you said that your voice might give out, because you had something in your throat, it reminded me of President Abraham Lincoln's remark when his doctor told him he might have smallpox. Calling his secretary, he said, "Bring in every office seeker who was in here recently tomorrow to the White House because now at last I have something I can give them all."

Mr. **Marquez**. I appreciate the reference to Abraham Lincoln.

Senator **Symms**. I want to thank both of you. We may have additional questions from other Senators on the committee, and we can submit those to you in writing. Thank you very much, both of you.

Mr. **Lukens**. We will be very happy to respond.

Senator **Symms**. Now we can get to some of the out-of-town witnesses.

Panel No. 3, Susan Crampton, secretary, Vermont Agency of Transportation; Fred D. Miller, director, Oregon Department of Transportation, representing the American Association of State Highway and Transportation Officials; and Ray P. Bass, highway director, chief administrative officer, Alabama Highway Department.

Fred, since you are the official representative of AASHTO, and Oregon borders Idaho, we will ask you to go first.

Senator Stafford, did you want to say anything more about Susan before we start here?

Senator **Stafford**. I mentioned once already that I was glad she was here. She is doing a great job in Vermont. I will say additionally to that that she and my oldest daughter were classmates at Middleberry College, which is also my alma mater, so it is almost old home week here.

Senator **Symms**. Mr. Miller, go right ahead.

## STATEMENT OF FRED D. MILLER, DIRECTOR, OREGON DEPARTMENT OF TRANSPORTATION, REPRESENTING THE AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS

Mr. **Miller**. I appreciate your logic on bordering States and representing AASHTO. I, too, will attempt to be brief. I have submitted testimony for the record, and with your permission, if that is considered submitted, I will not feel obligated to read through that, but I will paraphrase and make some points.

I am representing today both the Oregon Department of Transportation and the American Association of State Highway and Transportation Officials. I serve on the executive committee for AASHTO, and the newly created task force on DBE's. Since Tom Larson, our president, could not be here, I will be presenting the AASHTO testimony.

Briefly, when 105(f) was passed as part of the Surface Transportation Act, I think all of us appreciated that it was going to require a lot of work. There was plenty of activity addressed to the program. There was some mixed reaction, and certainly a diversity of opinion. But as an organization, we have tried to make it work.

Over the last 2 or 3 years, we have cosponsored with FHWA, regional seminars to compare successes, problems, communicate information, and to make it work better. We have conducted surveys to see what kind of success areas there are that we again can share.

In 1983, the organization adopted a policy statement that was supportive of the program, and that remains the policy statement for AASHTO. More recently, in October, at our annual meeting, we created the task force which should report back to the policy committee for AASHTO in February on a number of the issue areas within the DBE program, again to attempt to make it more effective.

I do want to comment on one issue that has arisen since there has been some confusion about it. There is a joint AASHTO-AGC-ARTBA executive committee that sits together and makes recommendations to those parent bodies. In fact, that executive committee did recommend that the next Surface Transportation Act not include 105(f). Our organization, that is, AASHTO, had the opportunity to adopt that position and chose not to.

As a matter of fact, when we examined that as a policy committee, we chose to retain our existing policy and, in fact, set up a task force to examine the issues and, as I said, to report back in February.

We do appreciate some concerns in the construction industry. We have talked about and heard about whether the number of DBE firms available is sufficient to meet the demand. We have talked about the impact on specialty contractors. We are concerned about front organizations. But these are all among the issues that we are going to be looking at as a task force and make recommendations on in February.

In summary, I would say that we all recognized, when 105(f) was passed, that it would be a challenge and would require some of our energies. We, as an organization, are trying to make it work. I would say generally, as you look at the program, the goals have been met. The number of contractors has been increased. There have been some problems, but I don't know that that was unanticipated.

We, as an organization and the State of Oregon, do remain committed to making the program work, and we are addressing it positively.

Senator SYMMS. Thank you very much.

Susan.

## STATEMENT OF SUSAN CRAMPTON, SECRETARY VERMONT AGENCY OF TRANSPORTATION

Ms. CRAMPTON. Thank you, Mr. Chairman.

As noted, I am secretary of the Vermont Agency of Transportation. I am also a member of the task force created by AASHTO to scrutinize the DBE program, section 105(f) of the Surface Transportation Act of 1982. I appreciate the opportunity to testify before you today.

Since the AASHTO Task Force has only begun its assignment, my testimony this morning will deal chiefly with ways that Vermont has responded to the 1982 law. Scheduled to testify before you are other AASHTO representatives who can address the task force mission, and you have just heard Mr. Miller's remarks.

In Vermont, we are proud, and justly, I think, of the manner in which the Agency of Transportation has administered the DBE and Woman's Business Enterprise sections of the Surface Transportation Act.

In order to stay within the 5-minute limitation on individual testimony, I will summarize our responses to questions posed by the subcommittee. Detailed answers are included in the submittal that will be entered into the hearing record.

Senator SYMMS. Without objection.

Ms. CRAMPTON. Since 1981, we have satisfied our annual contract targets with 10.38 percent of all Federal Highway Administration funded agency contracts for Federal fiscal year 1985 awarded or committed to DBE's and 13.85 percent of such contracts let to WBE's. We had 10-percent participation targets for DBE's and 3 percent for WBE's in the recent fiscal year.

In the process, the agency has encouraged and assisted in the establishment of new businesses run by disadvantaged persons and by women. We offer a program in conjunction with the Vermont Community College system that provides courses to help these owners learn how to better manage their businesses. Particulars on promotional programs are included in the additional testimony I am submitting.

These achievements have not been without difficulties or opposition, the latter chiefly from the established contractors who argue that they are better able to complete jobs, at lower cost, that now are handled by DBE's. Some contractors also complain that the State's assistance programs are subsidizing their competition.

The State appraises the situation differently, of course. In 1983, the agency decided that since compliance with 105(f) was now law, even though it allows a good faith option, we were going to attempt to meet the goal. We had some advantages related to the size of the State, to the small population, that enabled the agency to focus directly on indigenous disadvantaged groups. It also helped that Vermont's contractors, while influential, are not numerous. They have cooperated on compliance procedures.

In Vermont, median family incomes and levels of education for both high school and college graduates are higher than whites for all minority groups except Native Americans. Since Abenaki Indians constitute less than a quarter of 1 percent of Vermont's 510,000 residents, we have an easily identified DBE field to focus on. Also our biggest instate prime contractor in fiscal year 1985 was a WBE.

The Agency of Transportation has determined that the best way to achieve our overall W/DBE targets is to assign project goals. That allows us to have higher targets for some projects to offset work, chiefly in northern Vermont, where it is difficult to find DBE's willing to participate.

A special employee group was created within our contract administration division to deal with 105(f), supervised directly by the division head. This group handles certification, compliance and education programs. We had the good fortune to be able to hire a recently retired Federal Highway Administration official experienced with the law and familiar with Vermont's contractors. This consultant arrangement for field work has proved invaluable in scoring contractor compliance.

We have found an approach to the DBE certification process that so far seems to eliminate many of the problems that other States are experiencing. W/DBE contractors and support service suppliers headquartered in Vermont have to obtain Agency of Transportation certification, a process handled by the special group set up within the contract administration division. For out-of-State DBE's, who have been predominantly subcontractors, we require the prime contractor to furnish evidence of certification from the State where the sub originates.

We have reciprocal arrangements with most other States in region I that have proven satisfactory. For DBE's from States that refuse to enter into reciprocity pacts, the burden of certification falls upon the prime contractor. We have encountered no problems from the FHWA on certification, and as I mentioned, we are annually making our W/DBE participation targets. We feel that our special employee group has the capability to do out-of-State certification checks if they do prove necessary.

We have a compliance process that begins with submission of bids and continues with field checks. Final payment on any W/DBE goal contract is not made until the prime submits all invoices so the agency can verify that specifications were satisfied. Contractors are reluctant to disclose financial information, but they have cooperated since we make compliance a contract provision.

Close contact with contractors has helped the process, and contributed to better communications.

For Federal fiscal year 1985, we had 86 out-of-State DBE's certified to work in Vermont, and 12 in-State DBE's. Of the latter, nine are contractors and three provide support services. Because of the STAA and our State programs, we have doubled since 1981 the number of DBE firms doing construction in Vermont.

In this period, the State's total program has also doubled, so the contractor community has not been able to claim that it has suffered financially while we have been instituting the W/DBE programs. Historically, Vermont has not had much competition among paving contractors. In fact, the agency has had to debar for price-fixing our two largest paving contractors. Whenever we can get another bidder on a project, we feel that the competition helps the Agency of Transportation because more players tend to drive bids down.

Some States have lot specialty contractors, who went bankrupt when DBE's entered their markets. In our State, there are few such firms, and for those that do exist, we think the DBE's, owned chiefly by Abenaki Indians, again will lead to lower bids.

Established contractors are correct in saying that some costs have risen through use of DBE's. Lack of experience and expertise have driven prices up, but we think those drawbacks are short-term. Over the long haul, as DBE's and WBE's obtain this experience, the State stands to benefit in diverse ways.

In addition to more competition, there is a social advantage since each DBE that is established provides another solid contributor to the State's economy. DBE's and WBE's also are joining the contractor associations, and we anticipate that as their numbers increase, the time will come when the Agency of Transportation is not alone in promoting this program.

Thank you very much, Mr. Chairman. I am willing to answer any questions the subcommittee might have.

Senator SYMMS. Thank you very much.

Mr. Bass.

## STATEMENT OF RAY D. BASS, DIRECTOR, STATE OF ALABAMA HIGHWAY DEPARTMENT

Mr. BASS. Thank you, Mr. Chairman, and members of the committee:

My name is Ray Bass, highway director of the State of Alabama's Highway Department. I appreciate the opportunity of being able to address this committee this morning.

Minorities in Alabama, specifically blacks, have been a very strong part of the highway construction industry. Evidence of this is shown by the fact that the total contractor work force employed in highway construction in Alabama during 1983-84 was 40.7 percent black. The involvement of minorities has been in the area primarily of skilled laborers, laborers, low and middle management positions. There has been little involvement of minorities in the area of high level management and the financial aspects of highway construction. These are the areas that are the weakest, and in my opinion need more attention and continue to need attention.

It is my feeling that the reason minorities have not been involved in the area of high level management, financial matters, and the prime contracting arena is because of the fact that the highway contracting is a very high risk endeavor. The profit margin is marginal to low, and the risk extremely high.

Also in the highway construction industry, work must be performed under stringent design, specification and inspection procedures. These requirements are significantly more stringent in the highway construction industry than in other related fields of construction. The minorities can, in effect, be more effective in other areas of construction, and they have chosen to do that.

From the inception of the MBE Program to the present day, DBE and WBE Programs of the Surface Transportation Assistance Act of 1982, there have been significant problems to achieving the anticipated results of these programs which I envision was to move the DBE's and the WBE's into the arena of being able to participate in highway construction activities as viable contractors and as prime contractors. The main problems seem to have been centered around such firms having the financial and bonding capabilities to perform in this high risk low profit construction arena.

The program began in Alabama, utilizing the good faith efforts as a means of trying to reach an MBE goal. With passage of the Surface Transportation Assistance Act of 1983, a mandatory 10-percent goal was established. Due to the situation that there simply was not available the necessary capacity of minorities to reach this goal, there was extreme pressure on both the highway department and the nonminority construction industry.

Good faith efforts are subject to different interpretations and this led to much confusion and continual discussion among the parties concerned. It became evident that the department could not reach a 10-percent goal. The Alabama Highway Department then made the decision to apply to its contracts a clause requiring the contractor to meet a specific goal for a given project, or to face a penalty.

This clause provided an incentive to the contractor if he exceeded the preestablished goal for a given project and a penalty clause if he did not reach the predetermined goal. This effort did lead to the department reaching and exceeding the 10-percent goal for disadvantaged business enterprise, but it was felt that a good portion of this work was superficial and questionable as to whether it was real involvement or a front or sham. These various activities are under investigation at the present time.

This constant pressure on the nonminority construction industry continued to cause problems in relation to meeting a specific goal. The nonminority contractor had to expend considerable effort in recruiting and developing of DBE's. This involved assisting with banking, financing, bonding, equipment, management and all other related aspects of the contracting industry.

Many of these activities then gave the appearance of fronts and shams instead of viable DBE's. It is my honest opinion that that is what was developed in a good number of cases were fronts instead of viable contracting firms.

This, then, led to a continual confrontation between construction industry, the highway department and the Federal Highway Administration of certifying which DBE firms were legitimate, viable firms, and those that actually were simply fronts or shams.

A sufficient number of minority firms capable of performing 10 percent of the Nation's highway construction simply does not exist. If this is to be accomplished, such firms must be developed. This cannot be done overnight but must be developed over an extended period of time in order to avoid complete chaos in our highway construction industry.

After several months of utilizing the incentive clause in our contracts, the department determined that this effort was possibly leading to development of fronts and shams. It appeared from information received throughout this Nation that this problem was not simply one unique to Alabama. We found, in Alabama, the major areas of involvement of DBE's and WBE's were in the specialty contractor type areas. There was very little participation of DBE's and WBE's in bidding as prime contractors.

Many longstanding nonminority specialty contractors were being forced out of business or were either being forced into questionable business arrangements with a DBE or WBE contractor in an effort to stay in business. The reason they were being forced to do this was because the nonminority contractor, in an effort to meet his minority participation goal, had to go to the specialty contractors who were either DBE's or WBE's.

The department has gone back to utilizing the good faith efforts since, in our opinion, the incentive clause, although meeting a goal regarding a monetary value, was not bringing DBE's into a viable highway contracting situation.

Mr. Chairman, I have responded to the various questions that were asked in writing, and I ask that they be included as a part of my testimony.

Senator **Symms**. Without objection, they will be included.

Mr. **Bass**. In summary, it is my opinion that if the real intent of section 105(f) of the Surface Transportation Assistance Act of 1982 is to be accomplished, certain actions appear to be in order:

First, the elimination of the mandatory 10-percent goal. I think that an across-the-board 10-percent goal is unreasonable and certainly sanctions against departments that are involved would be regressive. You would be not only damaging the highway transportation programs of any State that was in this situation, but you would also be jeopardizing the minority participation of nonownership, but the actual employees of the highway construction industry.

Second, I think there should be established a Federal funded bonding and financial program, well defined by the act of the Congress.

Third, establish an educational and training program oriented toward highway construction management. This would place the minority people involved in a much stronger position as far as being able to carry on a viable construction business.

Fourth, the establishment of a certification of DBE's on a nationwide basis by the Federal Highway Administration. Certainly, the various States could be very instrumental in establishing this and bringing it about, but it should be a nationwide effort by the Federal Highway Administration.

If DBE firms are to be viable contracting firms, it is imperative that a federally funded bonding and financial program be made available so that these firms can gain the necessary training, experience, and management skills to participate in this highly competitive construction field.

A uniform certification process that is administered by the Federal Highway Administration is essential. This federally administered certification process would then provide all States with the same list of certified firms from which nonminority contractors could draw minority participation.

I thank you, sir.

Senator **Symms**. Thank you very much.

I just want to clarify one thing. Oregon's level of minority participation in 1982, before section 105(f) was implemented, was 7.7 percent of the State's apportionment. In 1984, the State's minority participation level was 11 percent. Is this 3.3-percent growth in participation an accurate reflection of the program's positive effect on DBE construction in your State?

Mr. **Miller**. Mr. Chairman, I would say, yes, I think that it is larger than it otherwise would have been.

Senator **Symms**. Do you have any prime contractors in Oregon?

Mr. **Miller**. Not many.

Senator **Symms**. So most of this is done under specialty contracts.

Mr. **Miller**. Primarily so, yes.

Senator **Symms**. What does the future portend? If you had one big prime contractor that would do one major job, you might end up with 10 percent in dollar volume in one contract; isn't that correct?

Mr. **Miller**. That is theoretically correct, Mr. Chairman, but we are looking at sort of a graduation program where, in fact, we could move people out of being DBE into prime contractors, and we would no longer count those.

Senator SYMMS. Vermont was 5.1 percent, and it is now 9.9 percent, so you have had about 100-percent increase almost. Do you think that your capacity has improved that much in that short length of time?

Ms. CRAMPTON. Yes, we do.

Senator SYMMS. I think you said in your statement that you did have a prime contractor.

Ms. CRAMPTON. Yes, we do have a prime contractor. We have both a prime DBE and a prime WBE.

Senator SYMMS. So you have someone, if they can achieve a bid. In Vermont, are your contracts awarded on the basis of the lowest bid?

Ms. CRAMPTON. Yes, they are.

Senator SYMMS. What happens if you are not making your 10 percent?

Ms. CRAMPTON. We select goals on projects, which we feel are achievable, the overall sum of these goals to achieve our 10 percent statewide goal. We have parts of the State, for geographic reasons, that it would be unlikely that a DBE would participate in a project. So we, in advance, select those projects where we ought to be able to achieve it, and we have been able to achieve it.

Senator SYMMS. Are most of the contractors specialty contractors?

Ms. CRAMPTON. Most of them are specialty contractors.

Senator SYMMS. As was said for Oregon, most of those are specialty contractors. What happens to the nonminority specialty contractors then?

Ms. CRAMPTON. Our program has doubled in size in the last 2 years, and there is business for all of them.

Senator SYMMS. In Alabama, Mr. Bass, your level was 0.9 percent in 1982, and it is now 12.7, that is an 11.8-percent increase. Is most of this specialty contracting?

Mr. BASS. We have 12 prime contractors in the minorities, and 5 WBE prime contractors. The vast majority of the work is done by specialty contractors, yes.

Senator SYMMS. So most of that 12.7 percent of your highway program is done by specialties, or is there some that is prime?

Mr. BASS. I would say that most of the increase has been specialty contractors, although we do have prime minorities that have bid as prime, and also WBE's that have bid as prime.

Senator SYMMS. I think you have said that almost 41 percent of the actual work done is by minorities, but not at the level of the financial management.

Mr. BASS. I am talking about in the area of employment by the highway construction industry; 40.8 percent, but this does not only include minority contractors.

Senator SYMMS. These are good-paying jobs in general?

Mr. BASS. Yes.

Senator SYMMS. You also mentioned your concern about fronts or sham operations. Do you suspect that some of that is going on?

Mr. BASS. I suspect that a good portion of the 11.8 percent would be shams or fronts, and this is being investigated at this point in time.

Senator SYMMS. But that is not the case in Vermont, or Oregon.

Ms. CRAMPTON. No. I have mentioned that we have a compliance person under a consulting agreement who used to be an FHWA district administrator, and we feel confident about the program.

Senator SYMMS. Are there any sham operations in Oregon that you are aware of?

Mr. MILLER. Mr. Chairman, it is a concern of ours. When you establish regulations, both on a Federal level and State level that lay out the ground rules, there are people who can play by those ground rules, and it doesn't necessarily look like an organization we would like to have, maybe legitimate or maybe not, but that will require more time on our part.

I am sure that it exists, and it is something that we have to continually look at.

Senator SYMMS. I think that I have used up my time. I see that Senator Burdick is here.

I am delighted that you are here, Senator. Do you have an opening statement that you would like to submit for the record, or anything that you want to say?

Senator BURDICK. I have an opening statement that I would like to submit for the record.

Senator SYMMS. We will put that in the record right after my statement and Senator Stafford's statement.

Senator Stafford.

Senator STAFFORD. Thank you, Mr. Chairman.

How successful have you been in Vermont in attracting out-of-State minority firms to work in our State and from how far away do you find that out-of-State primes are willing to come?

Ms. CRAMPTON. Primarily, New England. We have had one instance of a sub who came from Pennsylvania, but they come primarily from within New England.

Senator STAFFORD. Several witnesses have suggested a Federal bonding program for WBE and DBE firms. Has Vermont ever considered such assistance?

Ms. CRAMPTON. We have not. We have worked in a different way, where we have relied very heavily on supportive services to help develop the expertise, the ability within the organization to obtain their own bonding in the normal course of business.

Senator STAFFORD. Thank you.

Mr. Miller, when you have a strong suspicion that a sham may be in operation in Oregon, what do you do about it?

Mr. MILLER. Senator, we conduct onsite reviews to begin with and a certification process. Then if something comes up after that, then we again carry out an investigation.

As it stands now by State law, we are the certifying agency for all public entities in the State, so we are very much involved in that process.

Senator STAFFORD. Would you feel that you are able to eliminate a sham operation through this screening process?

Mr. MILLER. We certainly attempt to, but I couldn't guarantee to you that we always do. Sometimes it requires someone to raise the issue. It is a complex question, and it is a matter of us trying hard to take care of it.

Senator **Stafford**. Might I ask you the same question, Mr. Bass; when you have a strong suspicion that a sham operation is going on in your State, what can you do about it, or what will you do about it?

Mr. **Bass**. Of course, we make an indepth investigation by the department, and if we feel that this does exist, we disqualify that particular bidder. We also have a resident member of the inspector general staff that has been in Alabama for quite some time looking at the involvement of fronts and shams by so-called minority contractors.

Senator **Stafford**. Thank you.

I will substitute myself for Senator Symms temporarily.

Senator Abdnor, welcome to the hearing. Do you have any opening statement?

Senator **Abdnor**. No, thank you, Mr. Chairman.

Senator **Stafford**. Senator Burdick, do you have questions?

Senator **Burdick**. Yes, I have three short questions, Mr. Chairman. I will address these questions to Susan Crampton.

What percentage of your State certified minority businesses are bidding for prime contracts?

Ms. **Crampton**. I don't have that percentage. It is in my testimony that I will be submitting as a supplement. We will be submitting it to you.

Senator **Burdick**. Thank you.

Should a separate goal be established for the WBE's?

Ms. **Crampton**. Are you asking about a statutory goal? We always have a WBE goal established on our contracts, and we hold the bidders to those goals. They are not statutory goals, but they are goals within the bidding process.

Senator **Burdick**. What is that goal?

Ms. **Crampton**. We had a statewide goal last year of 3 percent, which we easily met, in fact, we exceeded it by a large margin.

Senator **Burdick**. Have any of your nonminority contractors participated in the FHAWA's protegé-mentor program?

Ms. **Crampton**. Yes, they have.

Senator **Burdick**. To what extent?

Ms. **Crampton**. Actually very few of them have participated in the mentor program. Primary assistance has come through our supportive services. Our consultant works very closely with this community.

Senator **Burdick**. I have no further questions.

Senator **Stafford**. Senator Abdnor, do you have any questions?

Senator **Abdnor**. No.

Senator **Stafford**. On behalf of the subcommittee, and on behalf of the full committee, let me thank all of you for helping us this morning with our deliberations on this important subject.

Ms. **Crampton**. Thank you.

Senator **Stafford**. The next panel will consist of Mr. Ralph Thomas, executive director, National Association of Minority Contractors; Mr. Roberto Cevera Rojas, director, National Hispanic Association of Construction Enterprises; and Mary A. Johnson, national WBE chairman, National Association of Women in Construction.

If you will come to the witness table, ladies and gentlemen. We have reached the point where we are going to have to be fairly tough about time since we are approaching the time when we are going to have to adjourn this committee. In consequence, we are going to point out to you the 5-minute green light on the traffic signal here, which then goes red. We will ask you to summarize your statement within that 5 minutes, and we are going to have to insist on it. With that warning, and with the additional reminder that your full statements will appear in the record let me caution you that the chairman of the full committee is quite tough about the 5 minutes. So you are duly warned, and please don't run the red light.

We will start, and I apologize if I mispronounced your name, Mr. Rojas, as we called your names, Mr. Thomas, with you.

## STATEMENT OF RALPH C. THOMAS III, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

Mr. THOMAS. Thank you, Mr. Chairman.

Mr. Chairman, my name is Ralph Thomas, and I am executive director of the National Association of Minority Contractors, better known as NAMC. NAMC is a full-service, nonprofit minority business trade association that was established in 1969 to address the needs and concerns of minority construction contractors nationwide.

Currently, our membership base covers 40 States, the District of Columbia, and the Virgin Islands. We are headquartered here in Washington, DC. Our members include general contractors, subcontractors, construction managers, manufacturers, suppliers, local minority contractor associations and funded technical assistance organizations. We have approximately 2,500 active members.

This testimony will deal with specific points of your concerns regarding section 105(f) of the Surface Transportation Assistance Act of 1982 as expressed in your letter to us dated November 5, 1985.

Section 105(f), of course, mandates that a minimum of 10 percent of the funds expended under the Surface Transportation Assistance Act to go to small businesses owned and controlled by socially and economically disadvantaged individuals.

Dealing first with capacity of DBE's, and by that I mean disadvantaged business enterprises for highway construction work, I think that the capacity for disadvantaged business enterprises to perform highway construction work is certainly not what it could be. However, we must realize, Mr. Chairman, that this predicament is not entirely the fault of the DBE's.

In the case of the minority contractor, it can be safely stated that his present disadvantaged position in the field of highway construction is as a direct result of historical exclusion, and such exclusion has extended to specialized education, craft training, management positions, financing and bonding programs, and subcontracting opportunities.

That is why the passage of 105(f) was such a noble effort on the part of Congress. Congress has already made a finding, in its passage of 8(a) of the Small Business Act, that there exists in this country a correlation between ethnicity and social and economic advantage. Moreover, Congress has found that it is in the national interest to expeditiously ameliorate this situation in order to obtain both social and economic equality and to improve the functioning of our economy.

It was in such a spirit that section 105(f) was passed. Thus, Mr. Chairman, when we start asking questions about the capacity of disadvantaged businesses to do highway construction work, we must also keep in mind that a major purpose of the subject legislation was to develop a marketable capacity among a significant number of DBE's to perform highway construction work.

Having addressed that point, we must then ask what has been done since the initial passage of section 105(f) to assure that a sizable number of DBE's is developed under such a program to perform highway construction work. This leads me to my next point, that of DBE's as prime contractors.

Without having any raw statistics at hand, it is my sense, as executive director of a national organization, that there is not an appreciable number of DBE's bidding for highway construction work as prime contractors. I think that one of the major reasons for this dilemma is because of the less than adequate outreach mechanisms that encourage DBE participation in projects covered by 105(f) at the State level.

Unless adequate efforts are made to inform and assist the DBE's to participate, such firms will not be afforded an opportunity to take advantage of the program and become qualified contractors in the road building industry.

As to adverse effects on nonminority contractors, I think when we speak of the possible adverse effects which the 105(f) program may have or has had upon nonminority specialty contractors, we must address such terms in the context of the purpose of the program.

For example, if we define adverse effects to mean that a majority contractor feels that he did not get a road building contract because of a State's obligation to meet DBE goal requirements, such incident should not be our primary concern in the context of these proceedings. The purpose of 105(f), ater all, is the mere use of yet another program to assist in this country's commitment to repair the present disadvantaged position of an entire segment of our society.

Nevertheless, there are adverse effects suffered by nonminority contractors in the context of the present implementation of 105(f) of which we should be concerned.

The inadequate outreach of the 105(f) program to minority contractors unduly burdens the nonminority contractors in their efforts to form joint ventures and/or subcontracts with such minority firms. In order to fulfill the intent of the program, nonminority firms must adequately and consistently be provided with the names and company profiles of minority firms available for joint venture and subcontracting opportunities.

There should also be stepped-up efforts on the part of States to bring the two groups together. We cannot set up a program in which we require the nonminority contractor to meet certain criteria, and then leave him dangling due to a lack of information.

Senator **STAFFORD**. Mr. Thomas, your 5 minutes have expired, but we will give you 30 seconds to summarize, if you would like.

Mr. **THOMAS**. Thank you, Mr. Chairman.

Essentially, the rest of my testimony dealt with the fact that we feel that the certification process should be uniform, and that there should be more training, financial, and technical assistance in terms of bringing the MBE's together with the knowledge of such programs.

Any additional cost in the MBE Program is more than taken care of in the long term goal of having self-sufficient minority firms to employ minorities.

Thank you very much for the extra time.

Senator **STAFFORD**. Thank you, Mr. Thomas.

Ms. Johnson.

## STATEMENT OF MARY A. JOHNSON, CHAIRMAN, WBE COMMITTEE THE NATIONAL ASSOCIATION OF WOMEN IN CONSTRUCTION

Ms. **JOHNSON**. Senator Stafford, and members of the committee..

The National Association of Women in Construction appreciates the opportunity to testify here this morning.

NAWIC was established in 1953, and it has over 8,000 members across the country and in Canada. Its membership is diverse and encompasses women in all phases of the construction industry. My position within NAWIC is that of the national WBE chairman.

Please note that this committee was just formed in September of 1984, and is entering its second year. Therefore, we do not have all of the data we would like at this time. Please note that I am giving this testimony for the NAWIC WBE's only, and only those WBE's who are certified, that are able to play a role in the percentages and goals of the DOT Program. I cannot give specifics on the DBE.

The following replies are in order of the letter pertaining to the questions from Chairman Symms.

The capacity of certified WBE participation for highway construction is increasing at a rate of approximately one-half of 1 percent per month, with new WBE firms coming into the program. There are approximately 3,000 WBE firms in NAWIC, and we estimate that 1,500 of these have the capacity to do highway construction primarily as subcontractors rather than primes.

NAWIC's survey is still in process with additional information being compiled. It is important to recognize that the heavy concentration of these WBE's are from the major industrial States, and a large percentage from the Northeast.

As mentioned, NAWIC is currently researching our WBE's, however, it would seem that the number of DBE's and WBE's bidding highway construction work should be readily available from the U.S. Department of Transportation.

We estimate that less than 10 certified WBE's from our association are bidding as prime contractors for highway construction work. Additional DBE's and WBE's could be developed through the Mentor-Protege Program, which has previously been introduced by the Department of Transportation.

Additional DBE's and WBE's could also be developed through training assistance on the projects under the Mentor-Protege Program. Our only concern with the Mentor-Protege Program is that it be closely monitored by conscientious parties or agencies.

Its effect upon the nonminority specialty contractor, if heeding the complaints heard in the past, is that the DBE is taking away their potential business.

Its effect on the WBE is unusual. Due to the low WBE set-aside percentages, many prime contractors wait until the very last moment to solicit the WBE participation. Since the WBE is historically utilized on a much broader basis than the DBE's, this places the WBE into a position of being forced to base their quotation on dollars needed for prime contractor compliance as opposed to scope of work quotation.

The certification process should be standardized across the Nation. There should be a regulation for reciprocal agreements between States for certified firms. As national chairman of the NAWIC/WBE Committee, I have been apprised of the certification regulations and applications of many States, however, I have enclosed the Massachusetts processes in each packet, as Massachusetts appears to be the most comprehensive.

Question 5. What kind of training, financial, or other technical assistance, and should this assistance qualify toward the 10 percent goal?

That really has to be addressed in two parts. Part 1 would consist of on-the-job training done on a specific project with a mentor-type program. This type of training should qualify foward the percentage program.

Part 2 would be the type of supportive training and assistance given by agencies and should not be considered toward the percentage goal.

The internal costs borne by agencies who administer the program cannot be ascertained by our association. However, those agencies who provide real services for the DBE's and WBE's, and thus absorb costs, will find that these same costs will be factored out when the bottom line develops in additional certified and qualified DBE and WBE firms having the capacity and capability to perform on DOT projects of increasing scope and dollar value.

Relative to fraudulent firms, we are aware that there are problems. However, the benefits far outweigh the problems. I did not have sufficient time to prepare statistics on the total dollar value to WBE's in the New England area, but I did find that the northern tier New England States had reached 4 percent which is over the goals set for fiscal year 1984 for the utilization of women owned firms. And we did here that Vermont has far exceeded that goal.

We have found that the lack of certified WBE's lends itself to the potential fraudulent practices and we believe that the increase in firms being certified will eventually lead to a preventative program against fraudulent use.

The demography of the United States is such that an outreach program to sister States, for example, reciprocal agreements, should provide sufficient WBE and DBE firms, however, in practice those States with small minority populations should consider reversing their percentages in favor of the WBE should the WBE community be in excess. It is logical and economically feasible to have an interchange between States. States should also initiate creative outreach measures to bring in new DBE's and WBE's that previously have been doing business, but not as certified DBE's or WBE's.

States should be reporting on a semiannual basis to DOT the measures they have taken and firms with whom they have been in contact. This information could be mandatory and, therefore, allow for outreach on a national basis.

Thank you.

Senator STAFFORD. Thank you, Ms. Johnson.

Mr. Rojas, we will be happy to hear from you.

## STATEMENT OF ROBERTO CEVERA ROJAS, DIRECTOR, NATIONAL HISPANIC ASSOCIATION OF CONSTRUCTION ENTERPRISES

Mr. ROJAS. Thank you, Mr. Chairman, members of the subcommittee, fellow colleagues, ladies and gentlemen:

My name is Roberto Cevera Rojas. I am the national executive director of the National Hispanic Association of Construction Enterprises. Our association was founded in November 1980, and now represents the interests of approximately 45,000 Hispanic-owned businesses in the construction sector, and of which we have approximately 2,000 members right now as active members.

We are pleased to be here today, and we are very excited to be able to present testimony on the Surface Transportation Assistance Act, and in particular section 105(f). I am going to try to limit myself to responding to the questions, and if I have a little more time, I will try to add to that.

Regarding the capacity for disadvantaged business enterprises and women business enterprises to do highway construction work, in our testimony we have indicated many of NHACE's constituents are general contractors who can and have performed highway construction work. We have members in Connecticut, Utah, New York, and California who have successfully performed highway construction work, both the physical, and the one thing that has been overlooked throughout this hearing, the design aspects as architects and engineers.

Currently, how many DBE's and WBE's are bidding as prime contractors for highway construction work? How can more DBE and WBE firms be developed as prime contractors?

NHACE has no way of determining how many are bidding as prime contractors for highway construction work on a national basis.

As it relates to the second half of the question, NHACE has been funded by a Federal agency and will be conducting and implementing a project in 1986 which we expect will increase the number of minority and women businesses capable of competing as prime contractors.

The two major aspects of the program that we are being funded to conduct are bond readiness and loan readiness. This means that all necessary documentation with supporting data will be completed prior to the firm actually needing the loan and bond. Therefore, when the firm applies for a loan or bond, the only information

BEST COPY AVAILABLE

needed will be a current financial statement. By these firms being bond and loan ready, it will put them in a very competitive position. That is one role that our association will play, regardless of the status of the State supported service contractors and what they are doing right now.

On the question of what effect has the section 105(f) program had on nonminority specialty contractors and WBEs. If there has been any adverse effects, how should it be addressed?

I would like to point out the fact that $72 billion have been earmarked for STAA throughout the 4 years of the program. On a regular basis, general contracting is 75 percent, 25 percent is sub, and only 10 percent would go to DBE's. Not counting the possibility of using architects and engineers and minority women field, I don't think that there have been any negative effects on specialty contractors at all.

As a matter of fact, the bonanza of $72 billion did not exist prior to 1982, and should be a number by itself.

What kind of certification process for DBE and WBE firms should be required? Should the process be uniform for all States?

NHACE recommends that schedules A and B that are in existence in the Federal sector be adopted and used in all States. Certification should be done by the U.S. Department of Transportation or their agent.

DOT should have an automated system in which State DOT's could access the certification data base electronically. In this way, there would only be one agency responsible for the certification and only one source to go for certification lists.

On question five, what kind of training, financial or other technical assistance are needed by DBE and WBE firms, and should this kind of assistance qualify toward the 10-percent goal?

Assistance to DBE's and WBE's should never qualify toward the utilization goals. The Federal and State governments, aong with private sector entities should pool their resources, financial and others, to deliver a program which provides business development assistance to DBE's and WBE's.

What, if any, additional costs does the section 105(f) program add to the Federal-Aid Highway Program?

NHACE is not familiar with any additional costs caused by section 105(f).

What, if any, experience have you had with firms that do not appear to be legitimate firms? How can the fraudulent use of this program be prevented?

We have not had any first-hand experience, although we have been informed by several of our members that they suspect firms. We have been asking them to contact us in order to contact the Department of Transportation.

How have States with small minority populations been able to meet the DBE requirements? What, if any, problems have they had in attracting out-of-State DBE firms?

Again, NHACE is not aware of any State that has had difficulty meeting the requirements. It is our understanding that those States have issued more contracts to DBE's than previously and they seek DBE's from nearby States.

I will go back again to the 10 percent over our goal, which does not count the professional sector of the architects and the engineers, lawyers, et cetera.

Thank you very much.

Senator **Stafford**. Thank you, Mr. Rojas. You made it within virtually the 5 minutes. I think that we will give you the Calvin Coolidge Award for brevity this morning.

Mr. **Rojas**. The one last statement that I would like to say. I was very pleased to hear the Honorable Parren Mitchell make the first statement that sometimes preferential programs such as Buy American are considered to be legitimate. I would like to say that the black community, the women's community, the Native American community, and the Asian community, and in particular my community, we are also Americans.

Thank you.

Senator **Stafford**. Yes, indeed, you are.

At this point, I think I should reserve for all members of the committee, who may not be able to be here this morning because of other committees that are meeting, and because the Senate has been in session since 9 o'clock this morning, the right to submit questions to panel members in writing for response in writing, if that is agreeable, and I hope that with you three it would be.

Having said that, I think that I will forgo questions. Senator Burdick, do you have any questions for the panel?

Senator **Burdick**. I have one that I would like to address to the members of the panel.

Contractors have complained that the capacity for DBE's and WBE's is really around 5 percent rather than 10 percent. What is your view on this?

Mr. **Thomas**. I don't agree with that percentage. I think that it is somewhere around 10 percent, mainly because of our own experience in providing contractors, either on the public level or the private level, companies or Government agencies that are looking for contractors.

For example, we have a set of 50 very large contractors who can virtually handle any type of job. The others are sort of medium size or subcontractor level. We have never had a situation in which someone called us and we couldn't provide contractors for them.

So I would suspect that the capacity of 10 percent is there. I do think the States and the private have to utilize national membership organizations a little more in order to reach them.

Ms. **Johnson**. I agree with Mr. Thomas. There are the minorities out there, and there are women out there. They can fulfill that 10-percent goal.

I think one thing that might be addressed by all of the associations here, and by the agencies present, is that there are so many people working on minority and women business directories across the country, it is so fragmented, if we could have one single source, one single directory, I think everyone would be amazed if all these directories were compiled, to see just how many minorities and how many women are out there.

Senator **Burdick**. How do you answer my question?

Ms. **Johnson**. I said, yes, we do have them.

Senator **Burdick**. How do you answer my question on the percentages?

Ms. **Johnson**. Yes, we can meet the percentages. They are out there, and the cry that you cannot find the minority, or you cannot find women, is not true. The 10 percent can easily be met.

Senator **Burdick**. Are they out there where we can find them?

Ms. **Johnson**. Yes, they are out there, Senator.

Senator **Burdick**. You can find them now?

Ms. **Johnson**. Yes, sir.

Mr. **Rojas**. If I may answer the question with direct statistics. We conducted a national survey of all 52 recipients of Federal aid for highways, and we found that only 25 answered. From the 25, we found out that we had 1,600 Hispanic-owned businesses in the construction sector certified by the States that responded as capable of doing the work, and that did not include the professionals, as I mentioned before. To design a highway project by a very capable minority firm in the architectural/engineering field, you don't have to live in that State. That accounts for 6 percent of every contract, that is a standard Federal rule.

So the answer is, definitely, I think there is enough capability among the minorities, Hispanic, women, Native Americans, and blacks, and others, that can fulfill the goal on an annual basis.

Senator **Burdick**. Thank you very much.

Ms. **Johnson**. Thank you.

Senator **Burdick**. Our next panel will be Robert Hirschman immediate past chairman, American Road & Transportation Builders Association, to be accompanied by Daniel J. Hanson, president of ARTBA and Cordell M. Parvin, attorney, Roanoke, VA.

Also we have James W. Supica, president, United Construction Co., Inc., and chairman of the highway division, Associated General Contractors. We have Gerald Buesing, president, Buesing Corp., Associated Builders and Contractors.

Welcome to the committee, gentlemen. You may proceed in any order you wish, just watch the light.

## STATEMENT OF ROBERT E. HIRSCHMAN, IMMEDIATE PAST CHAIRMAN, AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, ACCOMPANIED BY DANIEL J. HANSON, PRESIDENT, ARTBA AND CORDELL M. PARVIN, ATTORNEY, ROANOKE, VA

Mr. **Hirschman**. Mr. Chairman and members of the subcommittee: I am Robert E. Hirschman of York, PA, a highway and specialty contractor and immediate past chairman of the American Road & Transportation Builders Association. I am accompanied, as you said, by ARTBA president, Daniel J. Hanson and Cordell Parvin, an attorney-at-law and consultant to several contractor organizations in the United States.

The members of ARTBA are more concerned about the disadvantaged business enterprise program authorized by section 105(f) of the Surface Transportation Assistance Act of 1982 than any other provision of the Federal-aid Highway Program. At the very beginning ARTBA questioned the availability of sufficient qualified DBE firms to meet the established goal in the act of 10 percent. Information available to ARTBA and subsequently confirmed in a survey of contractor members indicated that the real availability in 1982 was only 2 to 3 percent. In the highway construction business, a successful contractor is not made overnight.

Nearly 100 percent of highway construction firms are family-owned and operated that have started small and grown. This requires large capital investment, personal liability, and expertise in construction gained only through many years of experience in specifications, financing, job operation, and performance. This is demanded by public agencies, and requires bonding.

Bonding companies will not even consider a bond unless these items are proved to their satisfaction. To expect DBE's that do not exist to perform 10 percent of the work under the foregoing requirements is ludicrous and emphasizes the lack of understanding of the highway construction business by the Congress in passing section 105(f) in 1982.

With the rigidity built into the Federal Highway Administration regulations to implement the DBE program, some contractors were forced to resort to questionable business practices in order to meet the DBE goal and receive a contract award with State highway/transportation agencies in order to pursue their livelihood. When a contractor may be declared a nonresponsive bidder for falling to achieve the 10 percent goal, he may enter into arrangements with people he knows are not legitimate DBE's.

Let me cite an example of how this program has fostered unsavory activity. During a recent letting of highway projects, landscaping work was an item on 12 projects. One ARTBA member firm, a nonminority specialty contractor, provided quotes to several prime contractors submitting bids on the work. He was not awarded any work on any of the projects. The following day, a Black minister approached the nonminority subcontractor and asked him to perform the work on the eight jobs for which this DBE firm controlled by the minister had been listed as the landscaping subcontractor.

This is only one example. Personally, as a specialty contractor, I would like to bring to the subcommittee's attention the serious effects that this 10 percent subcontracting goal for DBE's is having on the highway construction industry. Specialty contractors that have been in business for many years are rapidly being forced out of business since the free enterprise system and the lowest competitive bid no longer exists as it applies to highway construction. A nonminority specialty contractor can no longer stay in business because no matter what his price may be, he is told by the prime contractor that the job must be given to a DBE subcontractor in order to fulfill the predetermined artificial quota.

Mr. Chairman, with the subcommittee's permission, I would like to enter, for the record, numerous letters from prime contractors to subcontractors to verify these statements.

The transportation construction industry is deeply concerned. Section 105(f) has placed an unreasonable burden on the prime contractors. The burden of finding qualified and willing DBE's subcontractors for the job falls entirely on the prime contractors.

The successful bidder must achieve an arbitrary percentage DBE participation which was established without the involvement of the contracting community. Contractors question whether the States have carefully reviewed DBE availability and the opportunity for subcontracting when establishing the goals for various projects. Without proper prequalification procedures—prequalification and not certification procedures—how could State highway agencies know the work capability of DBE subcontractors?

ARTBA and its contractor members support the objective of achieving the opportunity for minority or disadvantaged firms to compete in the free enterprise system for bidding for Federal-aid highway work. They, however, do not believe in set-asides, quotas, or similar artificially used devices to gain minority participation in highway programs. This toying with the free enterprise system has not worked in other countries, and it will not work here.

The operation of the section 105(f) program has, in essence, become a quota in most States. It has had a chilling effect on the highway contractor, particularly the specialty contractor. Since it is not always easy to divide some projects subcontracting opportunities are somewhat limited. Quite often the specialty area is used to satisfy the goal because of the nature of the work.

When a highway contractor bids a job, he will look to the easiest area to meet his DBE goal—the specialty area of highway work. The burden placed on the prime contractor to meet the quota is as untolerable as the loss of work being experienced by the specialty contractors.

ARTBA strongly opposes the continuation of the existing section 105(f) program because prime contractors normally subcontract between 10 and 15 percent of the highway work on most projects, work costs more when this DBE quota system is used, approximately 10.7 percent higher; and true availability of DBE's is currently only in the 4 to 5 percent range.

Mr. Chairman, two last points should be made clear about the effects of the DBE language in the highway program.

First, I stated earlier in my testimony that specialty contractors are having the most difficulty coping with the statute. In recent months, two specialty contractors have sold at auctions most of their equipment to generate additional revenue to remain in business or as a preparation for bankruptcy.

Second, as long as the DBE program remains the law of the land, illegal or unsavory activity can be expected to continue as contractors attempt to continue doing business in highway work and related construction areas. May we again emphasize that legitimate DBE's do not exist to perform 10 percent of the highway work.

ARTBA strongly recommends not including a DBE program as part of the highway authorization bill which must be enacted by this Congress next year.

ARTBA suggests a better use for the money that is being expended for this program might be for the following: (1) training programs; (2) low interest loans; (3) business development grants for equipment; (4) Government guaranteed bonding; (5) help with financial matters for DBE firms, and (6) prequalification for all subcontractors by the State highway or transportation agency.

Thank you for calling this very important hearing today, and giving us the opportunity to appear on behalf of ARTBA. If you have questions, we will be more than happy to respond.

Senator BURDICK. Thank you.

## STATEMENT OF GERALD BUESING, PRESIDENT, BUESING CORPORATION, REPRESENTING THE ASSOCIATED BUILDERS AND CONTRACTORS

Mr. **Buesing.** Mr. Chairman, and members of the committee: I am Gerald Buesing, president of Buesing Corp., which has been in business in Long Lake, MN, for 21 years. The Buesing Corp. is a $10 million construction firm which contracts for highway and heavy construction, as well as construction trucking.

I am pleased to be here today before your subcommittee to testify on disadvantaged business enterprise program. This program is generating considerable controversy, and I appreciate the opportunity to express the concerns of the Associated Builders and Contractors on the impact of this program on the construction industry.

I have submitted a lengthy statement, and I would like that statement to become part of the record.

Associated Builders and Contractors is a national construction industry trade association representing more than 18,000 firms nationwide. The members, contractors, subcontractors, and suppliers of ABC believe in the merit shop philosophy of awarding construction contracts to the lowest responsible bidder and therefore, are concerned with the ramifications of the 10-percent DBE set-aside program.

Historically, Federal-aid highway contracts have been awarded through competitive bidding procedures to the lowest responsible bidder. This has resulted in quality highway construction, with the most construction value for the taxpayer dollars.

In 1983, this changed when the Department of Transportation began implementing the DBE Program. Under this program, at least 10 percent of the Federal-aid highway funds are to be awarded to DBE contractors.

ABC believes that the DBE Program is a stop-gap measure which does not improve the long term minority participation in the construction industry. Money that has been poured into the DBE Program is not an investment that will give DBE firms the long-term capability they need to be competitive in the real world.

These forced requirements for bringing in DBE firms have not made them competent, competitive enterprises. ABC has found many DBE's have problems with financing, bonding, sound business practices, lack of qualified supervisory personnel, and lack of qualified craftsmen.

We feel that we should go to the root of the problem by investing in the future of DBE's by making these firms skilled at both the craft and management level, thereby making them competitive without the need for preferential bid treatment.

The current effects of the DBE Program are threefold: One, the lack of qualified and capable DBE's, two, higher costs, and three, negative effects on nonminority specialty contractors. I would like to review these three areas with you.

First, the lack of qualified and capable DBE's in the Federal-Aid Highway Program has caused serious problems for ABC members. I would like to highlight this problem by relating an experience I recently had in finding DBE firms for highway work in Minnesota.

Minn-DOT currently lists 138 certified DBE contractors. We contacted and solicited for bids all of the 138 DBE contractors, and received only three quotes that were useable, two of which were trucking, and one landscaping. I am sure that you can appreciate the frustration this causes. This, unfortunately, is not an unusual occurrence. This is typical of what each contractor experiences when preparing a bid proposal. My written statement lists others.

ABC has also found that while many States appear to be meeting or exceeding their 10-percent goals, this has only been accomplished by passthrough or brokering companies. These companies are technically correct DBE firms which are not operating in the spirit of the law or in the manner in which the program was intended.

Passthrough companies or brokers have been created by the short supply of DBE firms. Many of our members have told us that there are a lot of brokers, but not enough bona fide DBE firms to meet the 10-percent requirements. This is a disturbing problem for ABC contractors who seek to hire bona fide minority firms, and it certainly negates the intent of the program to develop minority businesses able to effectively compete in the private sector.

The second problem I would wish to discuss is the higher costs associated with the DBE Program. We have heard from a number of members stating that the DBE requirements in Federal contracts have increased overall costs due to poor management on the part of DBE firms. I have cited examples in my written testimony.

Additionally, the DBE Program has caused increased administrative costs for the contractor in finding people through telephone calls, mailings, ads, and telegrams for quotes. Some contractors have had to hire extra personnel for this reason. Also, when a DBE is unable to perform as agreed, work is delayed and the costly process must begin again to find a replacement DBE contractor. Most important, we have found that the costs are substantially higher on contracts because prime contractors have to utilize quotes for minority firms to fulfill the 10-percent requirement.

Our experience is that a DBE requirement will add anywhere from 3 percent and possibly up to 14 percent more to a construction project. We do not believe these higher costs were the intent of Congress.

The third problem I wish to discuss is the negative effects the DBE Program has on nonminority specialty contractors. These types of subcontractors require less capital than the excavating, paving, storm sewer, and other portions of the highway contract.

A significant number of ABC members are small subcontractors, and we have heard numerous stories about their losses of volume and actual closings since 1983 due to the DBE Program. Here again I can relate a story from my own business, and the impact the DBE Program has had on us.

About 5 years ago, my construction trucking division did approximately a $3 million annual volume of business. This year, in 1985, I anticipate a $250,000 volume in trucking. The reason for the drop in volume is that on all of my own construction projects, I have had to subcontract out to DBE trucking firms in order to meet the 10 percent DBE requirements. Therefore, I have found it necessary to sell my construction trucks and layoff several employees.

I have only highlighted the impacts the DBE Program has had on highway construction. However, the bottomline is that the DBE Program to encourage minority and disadvantaged business firms into the construction business has not worked. Without the preferential treatment, few would be able to make it on their own. Handouts have never been made for self-sustaining, self-reliable companies. There is an old Chinese proverb that still remains true today. You teach a man to fish, and he feeds himself for life. We, at ABC, believe that the investment in training disadvantaged business enterprises for the purpose of improving their management abilities and preparing them for private sector projects, is the better solution to perpetuating artificial and counterproductive set-asides.

ABC believes that improved management skills and better access to job training programs for unskilled workers would help DBE contractors in both the public and private sector. The main weakness in DBE firms is their lack of good supervisory and management skills. Training by industry is the best route to go to develop the needed capabilities of DBE's.

ABC has taken the lead in developing a training curriculum to provide craft training through its Wheels of Learning Program as well as a supervisory level training program called (Training Orientation Program for Supervisors) TOPS.

Our ABC Minnesota chapter is working with Minn-DOT to provide management training to the DBE firms. We believe that more local contractor trade associations should work closely with State departments of transportation in providing training curriculum.

Senator SYMMS. Are you about to wrap it up?

Mr. BUESING. ABC recommends that joint efforts be made on the part of the Government and the private sector to upgrade the management skills of DBE firmowners and managers with the goal of bringing more DBE's into competitive, free market exchanges.

As long as DBE's are sheltered from reality by artificial set-asides created by the Federal Government, they will remain ill-equipped to deal with the realities of the free enterprise system. Therefore, ABC urges that the 10-percent DBE Program be eliminated from the reauthorization of the Federal aid highway bill in 1986.

Thank you, Mr. Chairman.

Senator SYMMS. Thank you very much.

I apologize for trying to hurry the witnesses along. I am just worried about what I see starting to happen on the Senate floor. I apologize that I was out of the room, but we have amendments on the floor which are very important to some of our dairy producing States. I had to go over to the floor.

Mr. Supica, why don't you proceed.

## STATEMENT OF JAMES W. SUPICA, PRESIDENT, UNITED CONSTRUCTION CO., INC., CHAIRMAN, HIGHWAY DIVISION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA

Mr. SUPICA. Thank you, Mr. Chairman.

I am Jim Supica. I am a highway contractor from Lenexa, KS, and I am here today in my capacity as chairman of the highway division of the Associated General Contractors of America.

We welcome and sincerely appreciate this opportunity to once again present the subcommittee with AGC's concerns over the devastating impact the disadvantaged business enterprise quota requirement, such as section 105(f) provision of the 1982 STAA, will continue to have on the highway program and the construction industry if included by Congress in the 1986 highway legislation.

At AGC, we only wish that Congress would have engaged in such hearings prior to the passage of the 1982 Surface Transportation Assistance Act. Perhaps if it had, today's hearings would not have been necessary.

Section 105(f) of the 1982 Surface Transportation Assistance Act requires that at least 10 percent of the act's funds be expended with business concerns owned by specially designated minority group members or disadvantaged business enterprises to the exclusion of all other bidders.

At the outset, let me explain that such a requirement is particularly harmful in the highway construction industry which does not lend itself to a large or significant amount of subcontracting. Highway construction is equipment intensive, and a capital intensive industry. On the average, 90 percent of a typical highway construction contract is accomplished by the general contractor's own work force, leaving approximately 10 percent available for subcontract award.

The result is that under the mandate of section 105(f) to subcontract 10 percent of the amount of the highway contract to a disadvantaged business enterprise, and with only 10 percent of the contract available to subcontract, general contractors on highway construction jobs are being forced to award 100 percent of that subcontract work to minority firms to the harmful exclusion of the nonminority subcontracting firms.

Another variation of this exclusion theme utilized by some States, as you heard earlier, to meet the requirements of section 105(f) is to simply set aside entire contracts and limit bidding and award only to DBE firms. In either variation, the results are the same. The awarding entity, be it general contractors for subcontract awards, or State transportation departments for prime contract awards, cannot make contract award decisions solely on the basis of lowest price, merit, competence, or any other relevant factors, but must, in fact, make awards on the basis of whether the firm is owned and controlled by individuals who meet the racial definition of section 105(f).

Section 105(f) has been in effect for 2½ years. What impact has it had on our industry?

In an effort to obtain detailed information on this impact of section 105(f), AGC, in December 1984, conducted a nationwide survey of its highway contractor members. Over 400 responses were received. The survey responses, which are set forth in detail in AGC's submitted statement, were compiled to draw the following conclusion with regard to the impact of section 105(f).

Conclusion one: Section 105(f) of the Surface Transportation Assistance Act of 1982 was enacted without adequate understanding of the availability of qualified DBE firms, or the time required by new DBE firms to develop expertise in the types of transportation construction work authorized by the act.

How could such an understanding have been developed when the provision was included in the legislation as a floor amendment, without debate and without hearings.

Regarding the availability of qualified minority firms, AGC's survey showed that a figure of 2.8 percent more accurately reflects the availability of qualified firms interested in and able to perform highway projects.

Conclusion two: Many problems are being encountered in the implementation of section 105(f), including project delays and extra costs such as those documented by the General Accounting Office in its study of the 10-percent minority business enterprise requirement of the Public Works Employment Act of 1977. AGC's survey shows a nationwide cost impact of approximately 7 percent. There are many reasons for this cost impact, among them the fact that 86 percent of the contractors responding to our survey indicated that they had to subcontract work to DBE firms to meet a quota requirement even though nonminority firms had quoted lower prices for the work.

Conclusion three: Because of the manner in which the Department of Transportation is dictating that the States implement section 105(f), contractors bidding on Federal aid transportation construction projects must meet or exceed DBE goals before they will be awarded the contract. That is, section 105(f) is being implemented as a quota program. AGC's survey shows that three-quarters of our members believe they must actually meet the contract DBE goals before they will be awarded the contract.

Conclusion four: The implementation of section 105(f) as a quota program is causing many nonminority specialty contractors to be forced out of business even though they often are quoting the lowest price to prime contractors. Since prime contractors, in order to meet the contract quota requirements, are being forced to use minority subcontractors regardless of the price.

Of the highway contractors responding to AGC's survey, 6 of the 10 indicated that they personally knew of a nonminority specialty subcontractor firm whose livelihood is being threatened as a result of section 105(f).

For all of these reasons, AGC urges this subcommittee to give this issue close scrutiny. AGC urges the subcommittee to conclude that no DBE quota requirements should be contained in the 1986 highway legislation.

Because the House Public Works Committee to date has ignored our expression of concern over section 105(f), and has seen fit in its bill to extend the provision through 1990, this subcommittee is literally our industry's last hope on this issue.

In closing, Mr. Chairman, I want to leave the subcommittee with a clear understanding of AGC's position on the extension of section 105(f). This issue is of such great concern to our members that AGC recently concluded that should Congress pass a 1986 highway bill that extends this provision, AGC will actively seek a veto of the legislation.

Our members have decided that they would rather risk giving up their livelihood than continue to operate their business under such an unconstitutional and immoral requirement, which is discriminating against thousands of nonminority firms, which is costing the taxpayers hundreds of millions of dollars annually, which is doing little, if anything, to create qualified and lasting minority contracting firms, which is rather resulting in a shell game of meaningless and misleading numbers and data, and which is forcing thousands of well-meaning highway contractors, in order to meet the unrealistic DBE quotas, to enter into business relationships with DBE's that are substantially viewed by uninformed observers as questionable.

Mr. Chairman, that concludes my remarks. I will be happy to respond to any of your questions.

Senator SYMMS. Thank you very much, all three of the witnesses. I apologize that I missed Mr. Hirschman's testimony. Mr. Supica testified that he observed that the 10-percent DBE requirement is forcing nonminority specialty contractors out of business. Did you make the same point, Mr. Hirschman?

Mr. HIRSCHMAN. Yes, and I am a specialty contractor.

Senator SYMMS. That is one of the reasons I asked you the question. I thought that you had probably observed that first hand.

Just so that I understand it correctly, what you are saying is that unless there are some prime contractors that are trained to get into this to meet the 10-percent quota, those people that are in the specialty business tend to end up being minorities. Is that correct.

Mr. HIRSCHMAN. Correct.

Senator SYMMS. Are they mostly sham operations, or are they the real thing?

Mr. SUPICA. Let me comment on that, Mr. Chairman. We have heard a lot of discussion today on shams and fronts. I would like to review for just a second, if you would please, back on January 6, President Reagan signed the Surface Transportation Act of 1982. The interpretation of it was that we must overnight come up with 10 percent as a minimum amount of minority contractors to be subcontracted to. Prior to that time, I think we heard testimony earlier, in some regions of the country there was 1 percent, our survey showed there was 2.8 percent of available DBE firms in these areas.

We immediately took the position that the way to actively bring minority contractors and women into the construction industry is through a program that historically developed most of the founders of our contracting firms, and that is through a mentor-protege type of an approach.

The private sector initiated this conversation locally as well as nationally to try to encourage this type of a procedure and program.

Senator SYMMS. A protege, you are saying?

Mr. SUPICA. A mentor-protege type of approach, and historically all the founders of our construction firms have developed their expertise and training by coming in and working under an existing qualified prime contractor in the form of a subcontracting specialty item.

We thought that this would be the best opportunity for the minority and the women to become actively involved in contracts. It was 2 years, 24 months later, before the Federal Highway Administration actually published guidelines that would identify the actual involvement.

A prime contractor can financially be involved in guiding this protege. The guidelines are so offensive. Economically, it provides the prime contractor with all of the financial risk, and it also spells out that the prime contractor can have little, if any, input into the operations of the DBE firm.

It was a 2-year period of time before those guidelines were actually established.

Senator SYMMS. How much did it cost us?

Mr. SUPICA. We estimate that it cost 7 percent.

Senator SYMMS. Do you agree that it is costing us that money?

Mr. HIRSCHMAN. We think that it is costing more than that. An ARTBA survey suggests the cost is at least 10.7 percent higher.

Mr. SUPICA. My point, to summarize, is that during that 2-year period of time, there were many different types of arrangements made with DBE firms in order to develop them. Today, with 20/20 hindsight and hard guidelines, that was done for nothing.

Senator SYMMS. I appreciate that.

Mr. Hirschman, in his testimony, recommends not including the DBE program as part of the highway reauthorization, but you do support training programs, help with bonding requirements, help with financial matters for DBE firms, and prequalification of subcontractors by the State highway transportation agencies.

What kind of a program are you talking about?

Mr. HIRSCHMAN. Basically, I am talking about prequalification instead of certification. Certification means that you are a minority, consequently, you can go out and do pretty much what you want, and you are automatically a contractor. Prequalification means that you are a contractor and you have the experience and the expertise.

To take a DBE and say you are qualified to do guardrail work, doesn't mean that they can do it. You still need experience. If a governmental agency has prequalified them, and they are capable of doing a $100,000 or a $200,000 job, you can see that they get that kind of job.

Senator SYMMS. Thank you very much, Mr. Hirschman.

Back to this estimate of 7 percent that AGC came up with. Would the two of you agree on this ballpark number?

Mr. HIRSCHMAN. We think that that is very low. We think that it is at least 10 percent. I have lost so many contracts in the guardrail business. I have had prime contractors tell me, "I can't give you the guardrail work because I have to give it to a minority contractor."

The minority contractor, I know who he is. I know that he falls under the classification that we are talking about here and it costs more than 10 percent in those cases.

Senator SYMMS. Where did you get the 7 percent?

Mr. SUPICA. We got it through our nationwide survey.

Senator SYMMS. Of the membership of AGC.

Mr. SUPICA. Yes.

Senator SYMMS. As has been stated, the House has already approved this through 1990. Is there some ground between incorporating a training program with a protege-mentor approach, and

BEST COPY AVAILABLE

there might be some way to come up with a solution, without rigidity to the 10 percent. It ought to be our goal that 5 or 10 years from now, there are some legitimate minority prime contractors, and that it would be easy to get a bid on a highway project that would take care of the quota for the year.

Mr. **Hirschman**. May I ask Mr. Parvin to comment. He has been a consultant to contractors for a long time.

Mr. **Parvin**. Do you want to meet a goal or a quota, depending on the point of view, or do you want to develop viable businesses that will survive after the goal, quota, or preferential program is finished?

The program that Mr. Hirschman was testifying to is a program that I am supporting, and one in which minorities and females in business would be given guaranteed bonding by the government, business development assistance, and provided with sufficient other resources to do the work. They would be given training and assistance along the mentor-protege approach.

The program as it is presently constituted, is costing a tremendous amounts of money. Again the issue is going to be to develop viable firms, which would suggest putting into place this idea of training, assistance, low-interest loans of business development, and grants. At the same time requiring those who are prime contractors to make best efforts to meet DBE goals if they are going to be established at all. Prime contractors should make best efforts to locate, assist, and negotiate in good faith with DBE and WBE firms, but not putting specialty contractors in the situation where they have a choice of either getting out of highway construction, or entering into what the Government is now saying are questionable practices in order to survive.

Those are my recommendations.

Senator **Symms**. We do appreciate all the witnesses who have testified, and we will now call upon Panel No. 6.

Mr. Charles Joseph, president, Charles Joseph Co., Rockford, IL; Ms. Margaret Stuttard, Traffic Control, Inc., Penn Run, PA, and the Association of Business and Professional Women in Construction, Pennsylvania Chapter; and Michael Martinez, AMI, Inc., Meriden, CT.

Mr. Joseph, why don't you begin.

## STATEMENT OF CHARLES JOSEPH, PRESIDENT, CHARLES JOSEPH CO.

Mr. **Joseph**. Thank you.

I am Charles Joseph, president of the Charles Joseph Co., a minority business located in Rockford, IL, which specializes in traffic control.

I come before you today as proof positive that programs such as section 105(f) do work. Today, DBE companies exist which are a direct result of section 105(f). This program has many critics, and it also has several problems. Some of these problems are intrinsic due to the nature of the program, others are extrinsic due to the nature of man. One can be modified or changed, and the other merely contained.

I am totally committed to the philosophy of section 105(f). However, I do invite your attention to certain key issues. To begin with, let us look at certification.

I believe what is needed is a national standard of certification, a specific mandate. First, the definition of economically deprived should be revised to state that no person or company with a net worth of $100,000 to $300,000 respectively can enter the program.

Second, the application for certification must be comprehensive and extensive, complete with a followup program for performance evaluation. Such a plan could effectively prevent many of the problems of this program.

Another major concern, of course, is fronts and frauds. Fronts must be prevented or eradicated. To facilitate this, I recommend a constant review of all DBE's; a close scrutiny of all mentor-protege relationships or split-ownership companies; a fraud law in each State commensurate with the Federal law concerning deceptions relative to DBE certification; and finally, decertification of existing fronts with certain and swift punishment.

These recommendations, coupled with a strong certification program will effectively remove fronts from the program.

The clarion call that is most often heard these days is a lament of nonspecialty minority contractors. I readily acknowledge the fact that some nonminority specialty contractors are being hurt, some even to the point of dissolution, though I feel the fear of this notably outweighs the facts.

Such was never the intent of section 105(f) as I understand it. What is happening is that the prime contractors are conducting business as usual. They have consistently subcontracted specialty items, and they continue to do so, and thereby to meet all of the minority requirements.

I am told by nonminority specialty contractors that without this program, I will have no problem because good minority companies will survive. Why then is it not safe to say that with this program, good nonminority specialty contractors will survive?

We can coexist and share in the wealth of this great country.

Training and technical assistance are very important to the success of this program. Most DBE's come to the program needing the Big Three—financing, bonding, and training. If they are like me, they come with little else, except a willingness to learn.

Training programs must be established to increase the potential for success, running from bidding to money acquisition, to management, and finally to execution. A viable vehicle for providing this guidance is the Mentor-Protegé Program. With the proper safeguards and incentives, the Mentor-Protegé Program has the potential to meet the needs of DBE's, and yet give something to prime contractors as well.

Lastly, DBE's do not normally bid as prime contractor, but rather as subcontractors. Many strict State regulations and prohibitively high startup costs all but eliminate DBE's as primes. The only way around these factors is to have more set-asides for DBE's and/or waive the above requirements.

In conclusion, there have been times in our lives when each of us has given another a headstart because we recognized that he did not have our aptitude, our ability, or our capacity. We thought nothing of this primarily because it cost us very little and it was usually in the interest of fair play. However, this time it costs something, something that many of us are not willing to pay. If it was right then, then it is right now.

I believe that this program was an attempt by those in power to right a long standing wrong. Whatever can be said against it is insufficient. It has been too long in coming, and there was just too much to overcome. Therefore, I beseech you to extend this program, to modify it where necessary, but to extend it. one day it may no longer be necessary, and I sincerely hope so, but that day is not today.

Thank you.

Senator SYMMS. Thank you very much, Mr. Joseph.

Next we will hear from Margaret Stuttard.

### STATEMENT OF S. MARGARET STUTTARD, CONTRACTOR'S TRAFFIC CONTROL, INC., REPRESENTING THE ASSOCIATION OF BUSINESS AND PROFESSIONAL WOMEN IN CONSTRUCTION, PENNSYLVANIA CHAPTER

Ms. STUTTARD. I represent the Association of Business and Professional Women in Construction of Pennsylvania, the Women Construction Owners and Executives of the United States, and myself as a woman business owner.

We are very concerned with the impact that 105(f) has had on the women business owners. I must interject here that as I listened to the testimony this morning, I thought maybe I had read 105(f) wrong. It seems that everyone is under the concept that women are included in the 10 percent set-aside for DBE's, which is not true. Each State has a separate goal that doesn't have anything to do with 105(f). The two separate goals have held the women owners to a critical limit in business. Our prices may be lower, our workmanship more competent, but due to the 10 percent set-aside for DBE's, we don't get the work. Price becomes secondary, the goal first.

This is not only detrimental for the women business enterprises, but it is hard on the construction industry. If the women business enterprises were included in the DBE Program, with one set-aside, competition would again become a factor. We may not be minorities as defined in 105(f), but we are definitely minorities when owning our own construction companies. In other words, we are asking to be included in the DBE Program.

In owning my own construction business, my own experience greatly examplifies the plight of women in the construction field. In the State of Pennsylvania, there is a 2-percent set-aside for women and, of course, the 10 percent for the DBE's. A lot of times, many of my constituents and myself will go out to the field with the concept that we have the entire item of work, to be told later on that we only have 2 percent, that is all we were needed for.

If there is no goal for WBE's on a set of plans, we might as well not even send for them. The prime contractor still will not, even though we can do the work, place women in the construction field.

I would like to address the problem of fronts, and tell you a little bit of what the State of Pennsylvania has done. We go through a very extensive ordeal, and we do go into the same ordeal whether we are WBE or DBE, even though we are not in the section 105(f).

The first section of it is documentation of all your stocks, your bonds, your line of credit, anything that is a document or a piece of paper that can be submitted to them. At that time, the inspector general reviews that, and if he feels that you are a quality contractor, that you could do business in Pennsylvania, the inspector general sends a criminal investigator out to your office, and they will go through every contract that you have signed, who signed your checks, and they will take a look at the checks. Then all of this goes back to the inspector general's office again for approval or denial.

There is a form of appeal, which I am not sure how it ranges in Pennsylvania, I didn't have to go that far. Not only did they put us through these three different things that you have to get approval, but they also backed it up with a fraud bill in the State of Pennsylvania.

They called us in and told us that if we were to be frauds in the State, and were caught, it would be 7 years of imprisonment for the women enterprises or the disadvantaged business enterprises, 7 years for the prime contractor who had knowledge of what you were doing or had talked you into it, 7 years for the Pennsylvania DOT employee who might be aware of what was going on and did nothing about it.

You can see that Pennsylvania has done extensive documentation of how these people should be WBE's and DBE's in the State, and what they expect of them.

The Association of Business and Professional Women in Construction recommends the following:

Women should be included in the DBE Program. The amended percentum should be increased to 13 percent. There should be a strong certification and decertification program to ensure that fronts and shams could not exist.

The U.S. Congress should mandate that all DBE and WBE firms participating on Federal-aid highway projects be certified in some form of recognized certification with education and training programs.

I would like to thank you all for the opportunity to appear before this Subcommittee on Transportation regarding section 105(f). If you have any questions, please feel free to ask them.

Senator SYMMS. Thank you very much.

Mr. Martinez.

### STATEMENT OF MICHAEL MARTINEZ, AMI, INC.

Mr. MARTINEZ. Thank you, Mr. Chairman.

Mr. Chairman, distinguished members of the Senate Subcommittee on Transportation, it is indeed an honor and a privilege to have this opportunity to share my views on the impact of the Surface Transportation Assistance Act of 1982, section 105(f). This committee should be commended, indeed, for its serious and conscientious deliberations to ensure equity and fairness on behalf of all Americans.

I testify before you today, Mr. Chairman, as a proud American of Cuban heritage, and as president of my own company, AMI, Inc., a small construction firm engaged in highway construction.

Unfortunately today, as a member of a minority group, there still exist many barriers to compete successfully in this great industry. I earnestly endeavored to penetrate this section on an equal footing, without the benefits afforded to one of my ethnic background. However, I found traditional sources of financing unavailable, therefore, my ability to obtain working capital, financing for machinery and equipment, and adequate facilities almost impossible.

Fortunately, this administration and this Congress have established a mechanism through which such opportunities can be obtained. I contacted a U.S. Department of Transportation funded program management center in New York City, Arawak Consulting, in conjunction with the Connecticut Department of Transportation designated consultant, the Sagamore Group. These agencies provided essential technical assistance and introduced our firm to alternative sources of financing which were innovative and creative.

Equipped with this financing, our company could effectively seek out and bid competitively for construction subcontract opportunities.

I am not suggesting, Mr. Chairman, that this was automatic. The nature of the construction industry, specifically as it relates to subcontractors, tends to be a closed shop. Relationships existing between general contractors and subcontractors oftentimes span several generations. Consequently, the new kid on the block finds the effort to penetrate these historical bonds an awesome task. If the new kid happens to be black or Hispanic, or of another ethnic group, it is even more difficult.

Mr. Chairman, I would like to say, I believe the subcontracting work that I have obtained, was given to me not in order to fill a quota, but because I was the low bidder.

Thanks to section 105(f), we have witnessed our company's growth since July 1983 from a force of two full-time employees to a present force of over 55 employees, with a tremendous economic impact on a depressed economic labor market in our town.

Also, we are planning to graduate to general contracting in the spring of 1986.

I would like to conclude by offering the following recommendations:

(1) section 105(f) should be extended to the life of the Surface Transportation Assistance Act and expanded to include expenditures in infrastructure repair;

(2) the State of Connecticut has an authorized set-aside program which provides an opportunity for subcontractors to make the transition to general contractors. More States need to be encouraged to adopt a similar policy;

(3) technical assistance needs to place more emphasis upon engineering and financial management services. Entrepreneur training needs to be introduced at the primary and secondary educational levels;

(4) continuation of the bonding and revolving loan program due to the fact that availability of capital is crucial to meet the needs of participating in highway contracting;

(5) the certification process needs to be strengthened with more effective scrutinization, rigorous monitoring of contract performance, increased site visits and detailed examination of the firm's capabilities. This procedure needs to be adopted by national agencies and required of all States participating in the Surface Transportation;

(6) the government should impose stronger penalties to discourage fraudulent practices which have severe civil and criminal consequences; and

(7) States which have limited DBE availability need to pursue a vigorous course of business development. A coordinated effort with agencies of similar mission, that is, U.S. Department of Commerce MBDA grantees, the Bureau of Indian Affairs, and to encourage out of State firms to relocate or to establish satellite operations, utilizing incentives similar to the ones used to entice outside job creating industries.

Thank you so much, Mr. Chairman.

Senator **Symms**. Thank you very much.

I have one question that I would like to ask. I might say at the outset that the Senate has on one, maybe two occasions, voted to incorporate women into the DBE Program.

I would like to ask you, Mr. Martinez, would you agree with that?

Mr. **Martinez**. No, sir, I would not.

Senator **Symms**. Mr. Joseph, how would you feel about that?

Mr. **Joseph**. I think that it would help facilitate the fruition of finding all the goals that are mandated. There are many who feel that this rivals the DBE portion.

Senator **Symms**. So you have mixed emotions.

Mr. **Joseph**. Yes.

Senator **Symms**. Spoken like a man with a strong wife at home. Did you want to comment on that again, Ms. Stuttard, since we didn't allow you to make a comment there?

Ms. **Stuttard**. It is just the fact that even though, as I have said before, the color of our skin may be white, women are very much disadvantaged in the construction area.

Senator **Symms**. How long have you been in the construction field?

Ms. **Stuttard**. Fourteen years, owning my own business for the past 4 years. I worked my way up the ranks. You are always considered the secretary. I just came from a 3-day course that I took for the business. We had groups of six that we had to go out and work out problems on. The first thing that they said to me was, "You are taking the dictation, are you not?" I don't take dictation, I am not a secretary and never was a secretary, but that is assumed when you are with a group of men. It is a different way of discriminating. They have the color factor, and we have the cutsie factor.

Senator **Symms**. Thank you all very much for your testimony this morning, and your contribution to our hearings. We appreciate it.

The next panel is Jeff Roehm, president of Traffic Service Division, American Traffic Safety Services Association, Inc., president, Enterprise Flasher Co., Elsmere, DE; and John Vande Velde, United Subcontractors of Illinois.

I would like to include in the record the statement of the Statewide Transportation Alliance of Associations in the State of Illinois. (See p. 455.)

## STATEMENT OF JOHN C. VANDE VELDE, VICE PRESIDENT, WARNING LITES OF ILLINOIS, INC., AND PRESIDENT, UNITED SUBCONTRACTORS OF ILLINOIS

Mr. **Vande Velde**. I am John Vande Velde, vice president of Warning Lites of Illinois, a traffic protection subcontractor. I am also the president of the United Subcontractors of Illinois and I hold the office of vice chairman of the Statewide Transportation Alliance Association.

First of all; I would like to thank you, Mr. Chairman, for allowing me the opportunity to present our views. The individuals I represent here today oppose this mandate because it is harmful in our industry where a large amount of subcontracting is not possible.

In many States, the 10-percent mandate of section 105(f) exceeds the minority population percentage. Therefore, in order to meet the quota, illegal shams and fronts are established. Broker-type firms that receive the contract award serve no commercially useful function.

Typically, we find that the shams and fronts are owned by minority individuals who are in no way economically disadvantaged. The result of this, we feel, is discrimination against nonminorities. The highway construction industry is now forced to operate under regulations which, in fact, prohibit nonminorities from competing equally with minorities.

The program has eliminated free enterprise. In essence, nonminorities are being punished, punished for the societal discrimination that has for centuries plagued the racial minority members. We have not, however, been found guilty of such discrimination, but according to Congressman James Moody of Wisconsin, and I quote: "Discrimination against nonminority contractors, specialty or otherwise, is exactly what was intended by the DBE Program." Need I say more?

Throughout the 29 years of Warning Lites' operations, we have survived many obstacles, but we cannot survive the effects of the DBE Program. We tried. In 1977, we created a minority-owned company, with an existing vice president who just so happened to be a minority, but definitely not disadvantaged. Within 1 year, we saw approximately 60 percent of the State contract work that would have been awarded to Warning Lites go to our minority business. At that point, Warning Lites still received benefits from the work.

However, in 1979, when the vice president decided to start his own minority business enterprise, that business was terminated. Then between 1980 and 1982, the quotas rose to 4 percent, and up to 15 percent in the city of Chicago. Possibly the greatest risk Warning Lites has ever taken and survived under these regulations occurred in 1982 when we began assisting a DBE firm in a mentor-protege type of association.

Our company taught the DBE owner the bidding process. We made our equipment available to him. Our employees became his employees. His accounting and tax records were maintained using our computer equipment and our personnel. We turned over our customers to our competitor.

We survived because the DBE leased our equipment, and then again the plan failed. A State investigation was performed covering our relationship, and although the State could prove no wrong doing outside of the grey area, we felt that the risk was too great, so our association once again was terminated.

The result on Warning Lites was a 90-percent decrease in State and city contract work which was suffered during 1985. This equates to $2.8 million for the first 6 months.

We learned many things during our association. For example, regarding the bidding process, the DBE got calls back from the prime contractors to fill their quota, but we did not. On the average, during 1984, our bid prices were 7 percent lower than the DBE, however, the low bidder was not awarded the contract.

You have to wonder what country you are in when a contractor tells you, "You are low, but I can't use you because you are not a DBE." We learned that we could no longer compete equally.

In 1985, it has only proven worse. Warning Lites lives by the EEO mandate required. Of approximately 60 employees during our peak season, 42 percent are minorities. Now, however, some of our minority employees have had to be laid off. They are still not working, let alone for a DBE.

If the intent of 105(f) was to provide more work for minorities, then the program has failed. There are a few minorities who have benefitted, however. We do not refute that. Judging from the line of minorities camped at Warning Lites' door, proposing that we use them to set up a front, some people undoubtedly have become very, very wealthy using this program.

In every case, the DBE entrepreneur requested 5 to 10 percent of the gross as their fee. Also in every case, we, of course, would perform the work, using all of our own equipment and paying all the bills. Yes, some people have benefitted.

Your 10-percent quota has been achieved and exceeded, but it has not been achieved by legal, qualified DBE's. It has been our experience that virtually all nonminority specialty contractors who have wanted to stay in business have been forced to team up with a DBE.

In an STAA meeting with Senator Symms' aid, Taylor Bowlden we openly admitted that these preposterous relationships exist. We know that if such illegal arrangement did not exist, your quota would not be met. The quota was excluded from the Defense Department regulations and the EPA's, and we want it excluded from ours.

It has become politically fashionable to incorporate racial preference programs in Government regulations. Discrimination against racial majority groups is not prevalent. All we want is free trade, equal rights, and fair competition.

As has been presented here, 105(f) was enacted without a true understanding of the business or availability of qualified DBE firms. Section 105(f) is being implemented as a quota program. An entire group of nonminority contractors are being systematically excluded from the right to participate in that type of work which has provided its livelihood for years.

In conclusion, what I am asking is to once again be able to compete in the free enterprise system. As a member of the 1968 and 1972 U.S. Olympic Teams, I know what competition is, I am not afraid of it. I made those teams on an equal opportunity basis because I was the best, and I worked hard, and I competed. Now, for the first time, no matter the effort I and my company expend, we cannot prosper, and it leaves us very few alternatives.

We needed no preference programs to establish ourselves nearly 30 years ago. We made it with hard work. All we want is the opportunity to continue in that same way.

Mr. Chairman, that concludes my remarks. Again, thank you all for the opportunity to present our testimony.

Senator SYMMS. Thank you very much.

Jeff Roehm.

## STATEMENT OF JEFF ROEHM, PRESIDENT, TRAFFIC SERVICE DIVISION, AMERICAN TRAFFIC SAFETY SERVICES ASSOCIATION, INC., ACCOMPANIED BY ROBERT GARRETT, EXECUTIVE DIRECTOR

Mr. ROEHM. My name is Jeff Roehm. I am presenting testimony today as the Traffic Services Division president of the American Traffic Safety Services Association. Seated with me to my left is our executive director, Mr. Robert Garrett.

ATSSA is a national trade association representing the traffic safety industry. For the most part, ATSSA members are small family-owned businesses who manufacture and install highway traffic safety devices.

As an industry, we have worked very hard over the part 3 years to make this program work. However, it is our feeling, after listening to testimony today and reading a myriad of reports and regulations which govern this legislation, that the best solution to problems created by the program would be for Congress to start all over again with a new and more workable plan.

Knowing the political realities, however, we realize the improbability of this, and we would like to recommend the following modifications which, if implemented, could make the program work better.

Item One—As a result the way section 105(f) of the Surface Transportation Assistance Act is being administered, a serious adverse effect is being felt by small companies in certain specialized areas. In some instances, 100 percent of the specialty items are being used to fill the goal.

In order to ensure that the goal of equal opportunity is met, and that the burden of such an effort does not fall on particular segments of the highway construction industry, ATSSA recommends that there be a limit on the amount of work in each contracting area which may count toward the 10 percent goal. We recommend that no more than 15 percent of the work done by a particular segment of the industry be counted toward the goal.

The record keeping and reporting procedures for accomplishing this would not be as difficult as it might be imagined. We have outlined in our testimony a plan to implement this.

Item 2, it is clear that the intent of the law was not that the people who were wealthy in their own right or successful in an area other than construction should benefit from this program. However, this is often the case. We recommend that anyone having a net worth in excess of $100,000 be determined not to be economically disadvantaged and not be allowed to enter the program.

Item 3, to avoid flagrant abuses and to protect those for whom the program is intended, a realistic gross dollar limit should be set for qualification as a small business as it relates to this program. The small business standards as set forth in section 3 of the Small Business Act are unrealistically high as applied to this program. For example, in our industry, 90 percent of all of our members have annual receipts of less than $1 million.

We recommend that for the purposes of this program, all of the SBA size standards be reduced by a minimum of one-half. For some specialty industries, including ours, these standards would still be high, but certainly much closer to reality of the highway construction industry than those currently being used.

Item 4, we believe there is a need for a standard certification procedure which would be followed by all States. There must also be a stringent and uniform enforcement procedure which would include specific items which we have outlined in our testimony.

Existing guidelines for DBE certification should be refined into a more specific standard form and procedure, and all States should be required to adhere to them.

Item 5, we believe that one of the great deficiencies of this program is the complete lack of funding for training and education of minorities who may be making their first entry into the highway construction field. There have been very few privately funded training programs for DBE's. Some new minority firms simply cannot even afford nominal costs for technical training.

There needs to be some Federal funding for training programs, particularly in the areas of general business management, accounting, bidding, et cetera. We recommend that a minimum of $5 million a year be authorized for the training and education of key DBE personnel.

Finally, although we support what we hope was the original intent of section 105(f) to provide equal opportunity to all Americans to compete in the economic arena, it is obvious from the testimony of the contractors here today, and other groups, that there are tremendous problems with the way the program is being administered. Anyone who says that the program is working well is just not listening.

We have suggested some changes that, if implemented, will make the program work better and place less of a burden on the contracting, and particularly the specialty subcontracting industry. If all of these changes cannot be implemented, we would make one last recommendation, that is, that the total program be phased out gradually, reducing the goal over a 4-year period, to 8 percent the first year, 6 percent the second, 4 percent the third, and 2 percent the fourth.

We appreciate the opportunity to present our views and we urge this committee and the Senate to take positive action to stop the reverse discrimination which has been brought about by this legislation, and to work and create an equitable program to ensure that all Americans have an equal opportunity to compete.

Thank you.

Senator **SYMMS**. Thank you very much.

John, in your testimony, you stated:

> In essence, nonminorities are being punished, punished for the societal discrimination that has for centuries plagued the racial minority members. We have not, however, been found guilty of such discrimination . . .

That is a direct quote out of your testimony. To say that you haven't been found guilty of discrimination is not quite the same as saying that there has been no discrimination. Has there been, in your opinion, in the past years, any racial, ethnic, or gender-based discrimination in the construction industry, and, to your knowledge, have you seen it?

Mr. **VANDE VELDE**. No, sir, as a matter of fact, Warning Lites of Illinois had a vice president who was a Mexican, who I referred to. He still would have been with us if it had not been for this DBE program, because he saw the opportunity. I think he has five companies now.

Senator **SYMMS**. Mr. Roehm.

Mr. **ROEHM**. I think there has been some discrimination. As we said in our testimony, we support a program, a preference program for minorities to emerge. But I think the current way that it is being administered needs aggressive overhaul.

Senator **SYMMS**. Thank you both very much. We appreciate both your testimony and your contributions to our hearings.

Now Panel No. 8, Mr. Donald H. Morse, contract administration supervisor, Idaho Transportation Department; Mr. James Laducer, MBE Program, Bismark, ND; and Mr. Alfred D. Watts, director, Office of Fair Practices, Maryland Department of Transportation.

I want to welcome you three here to the committee. We are delighted to have you here.

Don, we are always glad to hear from the Idaho Transportation Department. Would you please commence.

## STATEMENT OF DONALD H. MORSE, CONTRACT ADMINISTRATION SUPERVISOR, IDAHO TRANSPORTATION DEPARTMENT

Mr. **MORSE**. Thank you, Mr. Chairman, and members of the committee.

Capacities of DBE firms, as determined by Idaho's Department of Public Works, are reflected in the class of license obtainable by any contractor. Forty-eight percent of licensed DBE/WBE firms hold licenses for unlimited capacity. The remainder hold licenses in four other categories, with various limits. The percentage in each category compares favorably with that of the overall licensed community.

While this may not reflect the actual capacity of either group, it is the one measure we have available to us at the present. Six

DBE/WBE firms bid as prime contractors in Idaho. Of these, four were successful with their bids in recent years, two were first time prime contractors this past season.

The major constraint on firm development concerns the lack of liquid assets. This affects the ability to obtain both financing and bonding. Possible assistance would include continued efforts toward smaller contracts and liberalization of collateral requirements by bonding companies.

Another area of development lies with the DBE/WBE firms themselves. The general contracting community in our area believes that there is a lack of commitment to expand by many involved in this program. As a result of the program, they must be consulted, and many are content with the relative security of their present level of expertise.

The introduction of any additional firms into any area increases the competition and, presumably, would decrease the work available for previously established firms. Although we occasionally hear of specialty firms going out of business because of the intrusion of a DBE/WBE firm, we have not yet had any such allegations documented.

Unlike some States, Idaho does not require a prime contractor to accept a higher bid from a DBE/WBE just to make a contract goal.

The current recommendations in the Code of Federal Regulations 49-23 provides adequate guidelines for the States to develop procedures. A few minor clarifications would be helpful. The basic requirements as contained in 29-23 should be uniform for all States. Other requirements with respect to application questionnaires and administering the program, however, should be left to the State's discretion.

Idaho is comfortable with the services being provided by our supportive services contractor. This firm is charged with providing assistance to DBE/WBE businesses in the areas of financing, bonding, licensing, business planning, marketing, liaison with prime contractors, estimating, bidding, scheduling and recordkeeping. All such services are provided free of charge to the DBE/WBE firms.

Provision of these services should qualify toward the State's meeting its goal. Certain costs can be attributed directly to the program. Our supportive services contract costs approximately $100,000 per year, another $125,000 in Idaho Transportation Department salary costs and miscellaneous costs are involved in administering the program.

Discussions with two AGC chapters serving Idaho indicate that costs of 3 to 7 percent are added to bids because of the program. Good faith efforts do incur costs. Subcontracting work which might not otherwise have been done involves two overhead costs and might result in idling equipment. The extent of these added costs, however, cannot be substantiate.

Idaho's certification committee has denied a number of initial applications for various reasons. Few have appealed. No Idaho certified firm has been successfully challenged by a third party.

Abuses of the program are being reduced by careful screening and onsite review of applicants, followed by job-site reviews during actual periods of construction.

Idaho has a total of approximately 160 firms in its directory of which 40 are WBE firms. This includes highway construction firms, building construction firms, suppliers, service organizations, and consultants. Fifty-one percent of the DBE firms are from out-of-State and 7 percent are beyond our surrounding States.

Mr. Chairman, there is a last area that is of particular concern to the Idaho Transportation Department. The imposition of a flat 10-percent goal uniformly over the entire Nation, regardless of State or regional minority availability, is not equitable. The inequity is not only felt by the nonminority contractors, but must surely be realized by the minority communities in the States with heavier minority populations.

Idaho has demonstrated that it is possible to see that 10 percent of the work goes to a group that comprises 2 percent of the licensed contractors in the State. This allows areas with a larger percentage of available minorities to perform at a lower rate and still allow the Nation to meet an overall goal of 10 percent.

Another area of concern involves the employment of minorities by DBE/WBE firms. Although this too is a reflection of the low minority population in our part of the country, we certainly would like to see improvement.

The program certainly must have a conclusion. If it is effective, it should eventually become unnecessary. If it is not effective, it should be abandoned. If it is to be continued for the present, regional goals should be established in proportion to minority firm availability with respect to the overall contracting community.

Mr. Chairman, this concludes my prepared statement, and I will be pleased to answer your questions.

Senator SYMMS. Thank you very much.

The next witness is James Laducer from Bismarck, ND.

## STATEMENT OF JAMES K. LADUCER, DIRECTOR, NORTH DAKOTA MINORITY BUSINESS ENTERPRISE PROGRAMS, UNITED TRIBES EDUCATIONAL TECHNICAL CENTER

Mr. LADUCER. Mr. Chairman and members of the subcommittee. My name is James K. Laducer, and I am from the United Tribes Educational Technical Center located in Bismarck, ND.

I wish to note my appreciation in being invited to testify before you today about section 105(f) of the Surface Transportation Assistance Act of 1982. I am the director of the North Dakota Minority/Women Business Enterprise, which a special department in UTETC.

Mr. Chairman, I would like to request that our detailed testimony be included in the record, and I will summarize our testimony at this time.

Senator SYMMS. It will be.

Mr. LADUCER. The United Tribes Educational Technical Center is an accredited postsecondary vocational education school. It was founded in 1969 by the five Union Tribes of North Dakota. It provides training and technical assistance to American Indians and other special populations in our region.

Since 1976, we have provided recruitment, training, and specialized technical assistance to these groups through a supportive service contract with the North Dakota State Highway Department. Prior to this time, no such assistance was available directly or indirectly to the minority populations. When this program first began, there were only 8 identified firms that were minority that were eligible to participate in the program, and today there are 129 firms as a result of this program. They are all eligible to participate in the Minority Business Enterprise Program.

Mr. Chairman, the predominant minority population in the State of North Dakota are American Indians. This group represents some 3 percent of the State's population.

During the first 5 years of our supportive service program, we were successful in assisting businesses in effectively bidding competitively for highway contracts. Nevertheless, it was not until the implementation of the Surface Transportation Assistance Act of 1982 that we saw significant growth and participation by M/WBE firms in these projects.

Prior to this time there was no effective mechanism to ensure participation. Because our firms are first generation firms, and largely unrecognized in the business world, they experienced great difficulty in being utilized. There was no specific requirement before 1982 for participation of women and MBE's.

Mr. Chairman, I will answer question No. 1.

Presently, in North Dakota, there are 92 certified MBE's and 37 certified women business enterprises that are all interested in highway construction work. The majority of these firms are small specialty type firms with a handful of prime contractors.

In reviewing our capacity, our experience shows that North Dakota minority firms have the capabilities to perform at a full 10-percent level of participation as required under the Surface Transportation Assistance Act, section 105(f).

For example, the total amount of Federal funds received for construction in North Dakota from the Federal Highway Administration in fiscal year 1985 was approximately $80 million. Ten percent, or $8 million of these funds were to be expended by minority business enterprises in performance of construction contracts. As an end result, the minority business enterprises collectively exceeded this goal and reached a figure of $10,077,030. In addition, the women business enterprises received an additional $3,005,922 in contracts. Thus, minority and women business enterprises in North Dakota participated at a level of $13,082,952 in fiscal year 1985.

As the director of the Minority Business Enterprise Program for North Dakota, I receive numerous requests each day from both interested minority and women business enterprises. They are seeking assistance in participating in the highway construction industry. It is in my opinion that the resources are virtually untapped in North Dakota and that the capacity could be much greater if the Surface Transportation Assistance Act continues.

Question No. 2. In fiscal year 1985, there were a total of 197 highway construction contracts let by the North Dakota State Highway Department. During this time, there were 10 minority and 14 women business enterprises that bid as a prime contractor. Their bidding was a direct result of the Surface Transportation Assistance Act, section 105(f).

In response to the second portion of the question, there are two main areas that need to be implemented by minority and women firms if they are to develop into prime contractors. The firms need to obtain the experience and establish a good track record, and the firms need to secure bonding and capital capabilities to perform the work.

Under the Surface Transportation Assistance Act, the minority and women business enterprises do have the opportunity to get the experience and a good track record. But to get the bonding and capital capabilities is another story. There are all types of lending and bonding institutions that speak in terms of helping minorities. For example, there is the Small Business Administration, the Bureau of Indian Affairs, and the Department of Transportation's guaranteed loan and bonding programs available for minorities. These specific agencies guarantee up to 90 percent of a loan or a bond. The key is to get a bank and bonding agency to participate.

Because the majority of our minorities in North Dakota are American Indians and from reservations, they find it nearly impossible to get guaranteed loans, and bonds. The main reasons are that your local banks which finance like or similar type of established businesses usually refuse to lend moneys to minority businesses from nearly Indian communities. This occurs on or near Indian reservations. Bankers tend to view lending capital to such businesses as potentially harmful to their own small business community and their own local economic base.

Usually, private banking institutions are controlled by private business persons from that banking community who are in direct competition with our minority firms, again making it almost impossible to get the loans.

In reflection to the No. 3 question, our experience would not indicate any negative effect on nonminority specialty contractors. When the general public was requested by the State highway department to respond on the recommended goal for fiscal year 1986, there were few nonminority specialty contractors who responded. North Dakota, with a population of about 700,000 people, could use new businesses no matter what the specialty or status is. It is healthy for the economy.

In reference to question No. 4, through many years of experience in certifying minority and women business enterprises for the State highway department and other agencies, we have found that the best way for certification was to have an established screening committee board. It has members representing minorities, women, and other persons who are familiar with highway construction, business, accounting procedures, and Federal regulations.

When the screening committee dates are set, all applicants who claim the status of minority or female are required to appear before the screening committee. They are given an oral interview and answer any questions regarding their proposed business and qualifications. This is in addition to the required documentation. Usually at the end of the interview, after due deliberations, the screening committee board determines if the business is legitimate or not.

We have been very proud of this process and we have found it to be a very effective method for certification. Other States do their certifying by only reviewing written applications. They then make their determination from the information they receive on paper. This procedure is not thorough and it could be instrumental in allowing fraudulent or fronting firms.

I am in total support of a uniform process for certification by all States. In fact, I feel that States should pattern their certification process after North Dakota.

Senator SYMMS. Thank you very much, Mr. Laducer.

We will submit the rest of your answers to the questions for the record. It is an excellent statement. I have a couple of questions that I would like to ask you at the end, but we will hear from Mr. Watts now.

## STATEMENT OF ALFRED D. WATTS, DIRECTOR, OFFICE OF FAIR PRACTICES, MARYLAND DEPARTMENT OF TRANSPORTATION

Mr. WATTS. I am last, but I hope not least.

Senator SYMMS. Not least, we have been waiting for you all morning.

Mr. WATTS. Because I do recognize that we have some time limitations, what I would like to do is just summarize my testimony and answer the specific questions that were asked of me.

With regard to the capacity of disadvantaged businesses and WBE's, it is very difficult for us in Maryland to determine that particular capacity because the industry, as you know, is so dynamic. One possible measurement as to whether or not there is capacity, at least in the State of Maryland, would be to look at the Department's attainment levels.

I have listed the attainment levels, and you will notice that the attainment levels have either equalled or exceeded the goals that the Department of Transportation of the State of Maryland has established.

I should note, however, the way that the Department of Transportation looks at the MBE Program. We look at the MBE Program across-the-board. So we don't simply segregate Surface Transportation Assistance Act dollars from other dollars. We apply our goal across-the-board, so our dollar volume is going to be a little higher.

For example, you will note that in the attachment sections, with regard to disadvantaged businesses, the Maryland Department of Transportation spent some $127 million with disadvantaged business, and some $45 million with women businesses, but those dollars are dollars that include Surface Transportation and not specifically Surface Transportation dollars.

We obviously believe that there is a capacity in Maryland. We have over 700 firms that have been certified and are, in fact, doing the work.

With regard to the actual bidding, there is something that I would like to bring to this committee's attention. Yes, there are very few DBE's and WBE's in the State of Maryland that can bid as primes, but that is not unreasonable. It is something that we should expect.

The Surface Transportation Assistance Act, section 105(f), has only been in existence for about 3 years. It takes several years to become an experienced prime contractor. So there is no doubt in our mind that we are in a learning curve, and there is no reason to expect an MBE to become a prime contractor over such a short period of time.

The effect of the section 105(f) on nonminority specialty contractors, I have personally heard this quite often. The fact is, there is no objective evidence that we have been able to uncover which would allow us to conclude that, in fact, 105(f) did have an adverse effect on the nonminority specialty contractor, any more than any other new competition, or downturn of labor, or rise in labor costs and material. All of these factors have to be considered when you say that there is an adverse effect on the nonminority contractor, or a minority contractor, for that matter.

With regard to the kind of certification process, Maryland, obviously, supports the investigative type of certification process that we currently employ. We do not support self-certification, nor do we necessarily support a document-only certification that is employed in some other areas.

We do believe that if there was a full-fledged investigative type certification process as currently used in Maryland, that might help insofar as uniform certification is concerned. But if you are going into this self-certification, or document-review type of certification, then we would prefer that you not have a uniform system.

With regard to technical and other financial assistance. The only true technical assistance that the MBE or WBE needs in our judgment is in the area of bonding acquisition, and the acquisition of both short-term and long-term capitalization. Short-term with regard to the actual contract itself.

Let's face it, ladies and gentlemen, there is a methodology that can be used, and is being used by the prime contractors, called Mobilization. There is mobilization capital built-in most of the Federal-aid contracts, and that mobilization is used in lieu of, in some cases, your short-term capital.

This is not made available to the subcontractors, but it is made available to the primes.

You also have a need for long-term capital, and again that is where you get the dollars necessary to purchase the equipment, the trucks and other necessary materials to become a prime contractor.

What are the costs? I had to appear before several committees of the Maryland General Assembly, and they asked me the same question, so I was prepared to deal with it.

We looked at prime contractors, that included minority participation, and prime contractors, prior to that time, that did not include minority participation. Surprisingly enough, we were able to determine that, in fact, when you look at the prime contracts with minority participation, and those that did not have minority participation, there was no essential difference. As a matter of fact, we found that in most cases, in our instances, at least, the MBE program has in no way cost the State of Maryland any additional dollars. What it has done, however, is add about 3,000 more jobs—3,000 more jobs—over the past 5 or 6 years.

The experience with fronts that are not legitimate, yes, we have had that experience. What we have done, basically, in Maryland? We passed an MBE fraud statute with stiff penalties. As of today, I can report to you, Senator, that as a result of actions taken by my office, and subsequently followed through the Maryland Attorney General's Office, we have had two convictions. One was a 6-month probation, with a $6,000 fine. The second person served 6 months in jail.

There was one other area that I wanted to get into. Quite often, you hear a lot of prime contractors come in and say that the MBE's are submitting higher quotes or higher bids. The fact of the matter is—again, you are right, you have to understand the industry—prime contractors submit bids. Subcontractors, Senator, submit quotes. The difference is this. I can give you a quote for a dollar amount. Once I have given you that quote for that dollar amount, you are then free to go out and ask someone else, "Can you beat this price?" That happens all the time, and it is called shopping subs, bid shopping.

What in effect occurs is that, yes, I may in fact be low, but if somebody else knows my price, obviously, they can lower their price.

I am trying to rush through so that you can ask me whatever questions you like, Senator. Thank you very much for allowing me to come in and make my presentation.

Senator SYMMS. Thank you very much.

I do have a couple of questions I want to ask. The first one I want to ask of Don Morse from Idaho.

We have had some testimony, and people have told me about DBE firms that the prime contractors refer to as the two percenters. In other words, they would agree to run a subcontract through the books for 2 percent of the project. This is a complicated scheme. To your knowledge, is any of that happening in Idaho?

Mr. MORSE. Not to my knowledge, Senator.

Senator SYMMS. Do you think that most other States perform the same on-site inspection that you do in Idaho?

Mr. MORSE. I am not sure. We do onsite inspection on initial application of all firms within the State and those within commuting distance outside the State.

Senator SYMMS. What about North Dakota?

Mr. LADUCER. Could you ask the question again?

Senator SYMMS. The question is, in the industry, they talk about the 2 percenters. In other words, you let out a contract for 2 percent of the contract and they run it through the minority company's books.

Mr. LADUCER. That usually doesn't happen in North Dakota.

Senator SYMMS. Do you have a system to keep it from happening, onsite inspections, or what?

Mr. LADUCER. Yes, we do onsite reviews of every project.

Senator SYMMS. You said that you do onsite inspections in Maryland, Mr. Watts.

Mr. WATTS. Absolutely, 100 percent.

Senator SYMMS. But you said that you have had some problem in the past, and you think that you have corrected it now.

Mr. WATTS. Anytime you are dealing with large sums of money, you are always going to run across somebody who is going to try you. The people who tried us are the ones that we prosecuted.

Senator **Symms**. I would think that 6 months in jail would have a tendency to discourage people.

Mr. **Watts**. It will calm you down. It gets the point across.

Senator **Symms**. We don't want Social Security that badly, that is the ultimate.

Many Federal programs which provide trust responsibility to the Indian people have an Indian preference contained in their contracts. There is $100 million a year for Indian reservation road programs that is contained in the current highway law.

Does the availability of other Indian preference programs reduce the number of firms available for Federal aid highway work, Mr. Laducer?

Mr. **Laducer**. No, it hasn't.

Senator **Symms**. Why not?

Mr. **Laducer**. Mainly because most of the people bidding on Indian projects, they are on or near a reservation. Most of the minority firms that are off the reservation, a lot of them are Native Americans, but they don't bid on the BIA projects, mainly because of the paperwork, the redtape, the bureaucracy, or whatever you call it. They like to stay away from that.

Senator **Symms**. If I hear you correctly, you are saying that they bid on those on the reservation.

Mr. **Laducer**. No, they bid off of the reservation. They bid on the highway programs.

Senator **Symms**. They don't bid for those because of too much redtape?

Mr. **Laducer**. Yes.

Senator **Symms**. What is our experience in Idaho on that, Don?

Mr. **Morse**. We don't get a large number of projects on the reservation. We do have some, including one just recently. Our bidders were our standard bidding prime contractors.

We are involved with TERO,[1] ordinances as far as the employment of individual people in the trades needed. But our regular prime contractors are bidding on those projects, and we had our same WBE/DBE requirements in that proposal as we had in others.

Senator **Symms**. Thank you very much. I appreciate all the witnesses coming here this morning. It has been a very helpful hearing for this subcommittee.

The hearing record will be kept open, I might add, for a week or 10 days if there is someone else who wishes to submit testimony to the committee.

We stand adjourned for now.

[Whereupon, 1:15 p.m., the subcommittee adjourned.]

[Statements submitted for the record follow:]

---

[1] TERO is an acronym for Tribal Employment Rights Organization.

# STATEMENT OF THE HONORABLE PARREN J. MITCHELL
# BEFORE THE
# SENATE SUBCOMMITTEE ON TRANSPORTATION
# OF THE
# SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

**NOVEMBER 19, 1985**

**10:00 a.m.**

GOOD MORNING, MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. THANK YOU FOR INVITING ME TO APPEAR BEFORE YOU THIS MORNING TO PRESENT TESTIMONY REGARDING THE MERITS OF SECTION 105(f) OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982. THIS SECTION MANDATES THAT NOT LESS THAN 10 PERCENT OF ALL FUNDS AUTHORIZED TO BE APPROPRIATED OVER THE FOUR YEAR PERIOD (1982-1986) SHALL BE EXPENDED WITH SMALL BUSINESSES THAT ARE OWNED AND CONTROLLED BY SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS. WHEN I INTRODUCED THIS AMENDMENT TO THE ACT, I FELT THERE WAS A NEED FOR LEGISLATION OF THIS NATURE TO ENSURE THE PARTICIPATION OF SMALL DISADVANTAGED BUSINESSES IN MASSIVE PUBLIC SPENDING PROGRAMS.

TO DATE, THE SUBCOMMITTEE ON SBA AND SBIC AUTHORITY, MINORITY ENTERPRISE AND GENERAL SMALL BUSINESS PROBLEMS OF THE U. S. HOUSE OF REPRESENTATIVES HAS INVESTIGATED SIXTEEN DBE PROGRAMS AND RECEIVED TESTIMONY FROM FIFTEEN STATES AND THE DISTRICT OF COLUMBIA REGARDING THE IMPLEMENTATION OF SECTION 105(f) OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982.

THIS INVESTIGATION IS ON-GOING AND HAS ALREADY SPANNED A 19-MONTH PERIOD.

THE PURPOSE OF EACH OVERSIGHT HEARING IS TO COLLECT INFORMATION AND STATISTICAL DATA FROM EACH STATE AND THE U. S. DEPARTMENT OF TRANSPORTAION (DOT) THAT WILL REFLECT AND HELP US TO GUAGE HOW SECTION 105(f) IS BEING IMPLEMENTED.

MY SUBCOMMITTEE'S INVESTIGATIONS HAVE DISCLOSED PROBLEM AREAS THAT RESTRICT DBE PARTICIPATION IN HIGHWAY CONSTRUCTION AND URBAN MASS TRANSIT PROJECTS. HOWEVER, THE RECORD SHOULD CLEARLY SHOW THAT THESE PROBLEM AREAS EXISTED LONG BEFORE THE IMPLEMENTATION OF SECTION 105(f). MY AMENDMENT WAS AN ATTEMPT TO HELP ELIMINATE THESE PROBLEMS AND TO REMOVE THE BARRIERS THAT IMPEDE THE EMERGENCE AND GROWTH OF DISADVANTAGED BUSINESS ENTERPRISES. SUCCESS HAS BEEN GRADUAL AND CERTAINLY MORE TIME IS NEEDED TO ACHIEVE REPRESENTATIVE INVOLVEMENT OF MINORITIES IN PUBLICLY FUNDED PROEJCTS.

THE RECENT BARRAGE OF CRITICISMS AIMED AT THIS TEN PERCENT PROVISION BY THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA (AGC) AND MR. RAY BARNHART, ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION, ARE TOTALLY UNWARRANTED. THESE CRITICISMS OF THE PROGRAM ARE WITHOUT SUBSTANCE IN LIGHT OF THE FACT THAT NEITHER MR. BARNHART NOR THE AGC'S HAVE CONDUCTED A STATISTICALLY SOUND IMPACT STUDY OF THE IMPLEMENTATION OF

SECTION 105(f) AND IN LIGHT OF THE FACT THAT A MAJOR PART OF THIS PROGRAM WAS IN PLACE AS EARLY AS 1980.

THOSE WHO CHALLENGE THESE AFFIRMATIVE EFFORTS WOULD HAVE US BELIEVE THAT ALL "PREFERENCE" PROGRAMS ARE, BY THAT FACT ALONE, ILLEGAL. BUT, PREFERENCE IS NOT ILLEGAL -- INVIDIOUS PREFERENCE IS ILLEGAL. IF THE TERM "PREFERENCE" IS CONSTRUED AS THE ALLOCATION OF BENEFITS BY THE GOVERNMENT TO A PREDETERMINED CLASS OF ELIGIBLES, THEN THE CONSTITUTION MAY BE VALIDLY INTERPRETED AS PROHIBITING BOTH THE UNREASONABLE ALLOCATION OF THOSE BENEFITS AND THE ALLOCATION OF BENEFITS TO ACHIEVE OTHER THAN A LEGITIMATE GOVERNMENT PURPOSE.

WITHIN THESE CONSTITUTIONAL RESTRAINTS THE CONGRESS ROUTINELY USES A SYSTEM OF BOTH PREFERENCES AND SANCTIONS IN ORDER TO ACHIEVE DESIRED ECONOMIC RESULTS. THE BUY AMERICAN ACT (41 U.S.C. SEC. 10a, ET SEQ.) OFTEN REQUIRES THAT AMERICAN BUSINESS FIRMS BE GIVEN A BID PREFERENCE OF EITHER 6 OR 12 PERCENT OVER FOREIGN FIRMS WHEN COMPETING FOR FEDERAL CONTRACTS. PUBLIC LAW 85-804 AUTHORIZES THE MILITARY TO PAY EXTRAORDINARY CONTRACTUAL RELIEF TO ESSENTIAL DEFENSE CONTRACTORS IF SUCH PAYMENTS ARE NEEDED TO KEEP THEM IN BUSINESS, EVEN THOUGH SUCH CONTRACTORS ARE NOT OTHERWISE ENTITLED TO SUCH FUNDS UNDER THE TERMS OF THEIR CONTRACTS. THE TAX LAWS ALLOW OUR LARGEST DEFENSE CONTRACTORS TO POSTPONE THE PAYMENT OF FEDERAL INCOME TAXES PENDING THE TOTAL COMPLETION OF A DEFENSE SYSTEM. ACCORDING TO AN ARTICLE IN THE BALTIMORE SUN, UNDER THIS

PROVISION OF LAW, GENERAL DYNAMICS -- WHICH RECEIVED $7 BILLION IN FEDERAL CONTRACTS LAST YEAR -- HAS PAID NO TAXES SINCE 1976.

ON THE "SANCTION SIDE" OF OUR LAWS, THE SHERMAN AND CLAYTON ACTS ARE DESIGNED TO PREVENT MONOPOLISTIC AND ANTI-COMPETITIVE PRACTICES WHICH CAN EFFECTIVELY THWART OUR FREE ENTERPRISE SYSTEM. THESE LAWS DISCRIMINATE BETWEEN THOSE WHO DOMINATE A MARKET AND THOSE WHO DO NOT. FINES AND CRIMINAL PENALTIES ARE ALSO IMPOSED IN MANY AREAS DEALING WITH FEDERAL CONTRACTING TO ENSURE THAT THE GOVERNMENT IS TREATED FAIRLY AND HONESTLY WHEN IT PURCHASES GOODS AND SERVICES. NO ONE CAN SERIOUSLY DENY THE GOVERNMENT'S AUTHORITY TO DO BUSINESS WITH ONLY THOSE ESTABLISHEMENTS THAT AGREE TO SUPPLY CONFORMING GOODS AT REASONABLE PRICES. BUT, WE ACHIEVE THIS RESULT, IN PART, THROUGH THE ADMINISTRATION OF SANCTIONS AGAINST THOSE WHO WOULD VIOLATE THESE CONGRESSIONALLY IMPOSED STANDARDS OF CONDUCT.

IN ORDER TO ASSESS THE CONSTITUTIONAL VALIDITY OF THESE MEASURES WE NEED TO ANSWER TWO INQUIRIES: (1) DO THESE LAWS ADDRESS A LEGITIMATE GOVERNMENT PURPOSE? AND (2) ARE THESE LAWS AN APPROPRIATE OR REASONABLE MEANS TO ADDRESS THAT LEGITIMATE PURPOSE?

IF THE PURPOSE OF THE BUY AMERICAN ACT IS TO PRESERVE THE DOMESTIC MOBILIZATION BASE, CAN ANYONE HONESTLY CONCLUDE THAT THE CONGRESS LACKS THE CONSTITUTIONAL POWER TO ADDRESS THE LEGITIMATE PURPOSE OF OUR GOVERNMENT? FURTHERMORE, IS IT NOT A

REASONABLE APPROACH TO ACHIEVE SUCH PURPOSE THROUGH THE USE OF A LIMITED BID PREFERENCE?

IN A SIMILAR FASHION, IT IS ALSO A LEGITIMATE PURPOSE OF THIS GOVERNMENT TO ENSURE THAT CONTRACTORS ESSENTIAL TO THE NATIONAL SECURITY RECEIVE REASONABLE AMOUNTS OF ASSISTANCE TO REMAIN IN BUSINESS. CONGRESS HAS THE RIGHT - INDEED THE RESPONSIBILITY - TO PROVIDE FOR THE NATIONAL DEFENSE. THE COURTS HAVE TRADITIONALLY GIVEN THE CONGRESS BROAD LATITUDE IN THIS AREA.

IT IS, IN ADDITION, BEYOND DISPUTE THAT CONGRESS HAS THE JURISDICTION OR POWER TO STYMIE ECONOMIC CONCENTRATION BY DECLARING ILLEGAL MONOPOLIES AND OTHER ANTI-COMPETITIVE PRACTICES. IN MY OPINION THERE CAN BE NO GREATER THREAT TO AMERICAN FREEDOM THAN THE AGGREGATION OF WEALTH IN THE HANDS OF A PRIVILEGED FEW. THE CONGRESS, DATING BACK TO THE LAST CENTURY, HAS RECOGNIZED THIS ECONOMIC REALITY AND HAS ADOPTED REASONABLE SANCTIONS AGAINST THOSE WHO WOULD MONOPOLIZE OUR COMMERCE.

WITH THIS IN MIND, IT APPEARS THAT CERTAIN GROUPS AND CERTAIN INDIVIDUALS WOULD LIKE TO PERPETUATE MONOPOLIZED ACTIVITY IN THESE AREAS AND DENY MINORITY ENTREPRENEURS EQUAL OPPORTUNITY TO COMPETE IN THE MARKETPLACE. THESE CRITICS WOULD HAVE US BELIEVE THAT EITHER ONE GROUP OR THE OTHER, BUT CERTAINLY NOT BOTH, CAN THRIVE AT THE SAME TIME IN THE SAME ARENA. I BELIEVE MR.

CHAIRMAN THAT THE ECONOMIC ARENA IS LARGE ENOUGH FOR ALL TO THRIVE.

THE SECOND PART OF MY TESTIMONY WILL ADDRESS THE QUESTIONS LISTED ON YOUR LETTER OF INVITATION.

(1) WHAT IS THE CAPACITY FOR DISADVANTAGED BUSINESS ENTERPRISES (DBES) AND WOMEN BUSINESS ENTERPRISES (WBE) FOR HIGHWAY CONSTRUCTION WORK?

IF BY CAPACITY YOU MEAN ARE THERE SUFFICIENT NUMBERS OF MINORITY CONTRACTORS, YOU MUST REMEMBER THAT MEETING GOALS IS NOT SOLELY CONTINGENT UPON THE SIZE OF THE MINORITY POPULATION OF A GIVEN STATE, BUT RATHER ON HOW CONTRACTS ARE AWARDED. SOME STATES WITH SMALL MINORITY POPULATIONS HAVE MET/EXCEEDED THEIR GOAL LEVELS BY AWARDING PRIME CONTRACTS TO DBES AND BY ENCOURAGING THE EMERGENCE AND GROWTH OF NEW DBES. FOR EXAMPLE RHODE ISLAND, WISCONSIN AND IDAHO HAVE SMALL MINORITY POPULATIONS, BUT THEY HAVE BEEN ABLE TO MEET THEIR GOAL.

DBE PARTICIPATION IS NOT LIMITED TO HIGHWAY CONSTRUCTION PROJECTS ONLY. DBE PARTICIPATION CAN BE COUNTED IN NON-CONSTRUCTION AREAS SUCH AS INSURANCE, BANKING, LAW, COMMUNICATIONS, ACCOUNTING, ETC.

(2) CURRENTLY, HOW MANY DBES AND WBES ARE BIDDING AS PRIME CONTRACTORS FOR HIGHWAY CONSTRUCTION WORK? HOW CAN MORE DBE AND WBE FIRMS BE DEVELOPED AS PRIME CONTRACTORS?

HIGH DOLLAR VOLUME OF CONTRACTS AWARDED PREVENTS DBES FROM BIDDING AS PRIMES. SINCE THE IMPLEMENTATION OF SECTION 105(f) SOME STATES SUCH AS IDAHO, PENNSYLVANIA AND WISCONSIN HAVE ADDRESSED THIS CONCERN BY BREAKING OUT CONTRACTS INTO PORTIONS THAT ALLOW DBES TO BID AS PRIME CONTRACTORS.

(3) WHAT EFFECT HAS THE SECTION 105(f) PROGRAM HAD ON NON-MINORITY SPECIALTY CONTRACTORS AND WBES? IF THERE HAVE BEEN ADVERSE EFFECTS, HOW SHOULD THEY BE ADDRESSED?

AS OF TODAY, THERE ARE NO OFFICIAL DATA AVAILABLE ON THE IMPACT OF SECTION 105(f) ON NONMINORITY SPECIALTY CONTRACTORS. NOR HAS THERE BEEN ANY VALID OR OBJECTIVE ASSESSMENT OF SUCH AN IMPACT.

THIS IS NOT TO SAY THERE HAVE BEEN NO ALLEGATIONS OF A NEGATIVE IMPACT OF SECTION 105(f) ON NONMINORITY SPECIALTY CONTRACTORS. BUT IF THERE HAS BEEN A NEGATIVE IMPACT IT IS NOT THE RESULT OF THIS LEGISLATION, BUT RATHER THE RESULT OF HOW SOME STATES HAVE BEEN AND CONTINUE IMPLEMENTING THE PROGRAM AND HOW SOME PRIME CONTRACTORS SUBCONTRACT PORTIONS OF THE PROJECT. THIS CERTAINLY IS NOT A NATIONAL PROBLEM. IT IS NOT HAPPENING IN ALL STATES, ESPECIALLY THOSE STATES THAT HAVE BEEN INNOVATIVE IN ADMINISTERING THE PROGRAM.

IN 1980, UNDER SECRETARY GOLDSMITH, OF THE U. S. DEPARTMENT OF TRANSPORTATION, STATES WERE SUBMITTING MBE GOALS TO DOT. AT

THAT TIME, THERE WAS NO INDICATION THAT THIS PROGRAM WAS HAVING A NEGATIVE IMPACT ON NONMINORITY SPECIALTY FIRMS. (SEE MINORITY BUSINESS ENTERPRISE REGULATIONS, 46 CFR, PART 23).

YOU MUST TAKE INTO CONSIDERATION THAT SPECIALTY WORK FLUCTUATES FROM YEAR TO YEAR DEPENDING UPON STATE REQUIREMENTS, AND PROJECT LOCATIONS CERTAINLY VARY.

PENNSYLVANIA AND WISCONSIN ARE TWO STATES THAT HAVE TAKEN PREVENTIVE MEASURES TO ADDRESS THIS CONCERN. BOTH STATE HIGHWAY AGENCIES ARE WORKING VERY HARD TO EXPAND THE DBES' SKILLS IN AREAS OTHER THAN SPECIALTY, THROUGH MENTOR-PROTEGE RELATIONSHIPS AND OTHER INNOVATIVE APPROACHES TO AVOID "BUNCHING" OF DBE FIRMS IN THE SPECIALTY AREAS.

HOWEVER, THESE SAME CRITICS REPORTED (AGC'S CONSTRUCTION PUBLICATION, DECEMBER 1984, p. 22) THAT IN 1984 HIGHWAY CONTRACTORS EXPERIENCED CLOSE TO A 30% INCREASE IN WORK VOLUME OVER 1983. MOREOVER, THE AGC PROJECTS A 14.3% INCREASE IN THE 1985 VOLUME. IN THE LAST TWO YEARS ALONE, THE MEMBERS OF THE AGC HAVE EXPERIENCED A 44% INCREASE IN WORK VOLUME. SO ON ONE HAND THEY REPORT THAT THIS LEGISLATION IS DRIVING THEIR MEMBERS OUT OF BUSINESS AND ON THE OTHER THAT IT HAS RESULTED IN AN INCREASED WORK VOLUME.

ATTACHED TO MY STATEMENT IS A LIST, PROVIDED BY DOT, OF THE NAMES OF FIRMS THAT REPORTED ADVERSE (ECONOMIC) IMPACTS

RELATED TO THE IMPLEMENTATION OF SECTION 105(f).

THE NELIGIBLE NUMBER OF NAMES AND THE LOCATIONS OF THE INDIVIDUALS ON THIS LIST CONFIRM MY BELIEF THAT THIS ALLEGATION IS NEITHER AS WIDESPREAD NOR OF THE MAGNITUDE THAT THE OPPONENTS OF SECTION 105(f) WOULD HAVE US BELIEVE.

(4) WHAT KIND OF CERTIFICATION PROCESS FOR DBE AND MBE FIRMS SHOULD BE REQUIRED? SHOULD THE PROCESS BE UNIFORM FOR ALL STATES?

IN MY RESPONSE TO THE PROPOSED REGULATION REGARDING THE IMPLEMENTATION OF SECTION 105(f), I MADE A VERY STRONG ARGUMENT FOR UNIFORM GUIDELINES FOR CERTIFICATION. HOWEVER, SOME STATES HAVE PECULIARITIES THAT MAY PREVENT THEM FROM CONFORMING TO A UNIFORM CERTIFICATION PROCESS.

(5) WHAT KINDS OF TRAINING, FINANCIAL OR OTHER TECHNICAL ASSISTANCE IS NEEDED BY DBE AND WBE FIRMS? SHOULD THIS KIND OF ASSISTANCE QUALIFY TOWARDS THE 10 PERCENT GOAL?

DBES LIKE ANY OTHER DEVELOPING SMALL BUSINESS NEED A LOT OF ASSISTANCE. VERY OFTEN DBES DO NOT HAVE ACCESS TO WORKING CAPITAL. THEY CANNOT BORROW ON REASONABLE TERMS, FROM CONVENTIONAL LENDERS WITHOUT GOVERNMENT HELP. DBES IN MANY INSTANCES CANNOT SECURE THE BONDING REQUIRED TO PERFORM ON A PROJECT BECAUSE THEY LACK THE NECESSARY EQUITY AND

PERFORMANCE RECORD. THESE TWO BARRIERS ALONE CAN PREVENT THE DBE FROM GETTING A BUSINESS "OFF THE GROUND".

DBES NEED MANAGEMENT ASSISTANCE. THEY NEED ASSISTANCE WITH PLANNING, ORGANIZATION AND IN DEVELOPING THE SKILLS NECESSARY TO CONTROL A BUSINESS, ASIDE FROM THE ADMINISTRATION OF DAILY ACTIVITIES.

DBES NEED MARKETING ASSISTANCE. MORE OFTEN THAN NOT DBES HAVE THE EXPERTISE AND CAPABILITY TO PERFORM ON A PROJECT, BUT THEY HAVE DIFFICULTY PUBLICIZING IT, SO THAT OTHERS IN THE INDUSTRY WILL KNOW WHAT SERVICE(S) THEY CAN PROVIDE.

THIS KIND OF ASSISTANCE SHOULD BE PROVIDED BY THE STATES THROUGH SUPPORTIVE SERVICES, OUTREACH PROGRAMS, WORKSHOPS, ETC., BUT IT SHOULD NOT BE COUNTED TOWARDS MEETING THE GOAL; INSTEAD IT SHOULD BE REGARDED AS A NECESSARY PROGRAM TO ASSIST DBES IN DEVELOPING VIABLE BUSINESSES.

(6) WHAT, IF ANY, ADDITIONAL COSTS DO THE DBE AND MBE PROGRAMS ADD TO THE FEDERAL-AID HIGHWAY PROGRAM?

FEDERAL CONTRACTING REGULATIONS PROVIDE THAT THE PRIME CONTRACTOR IS TO ACCEPT THE LOWEST RESPONSIVE BID. ALL STATES ARE GIVEN A FIXED AMOUNT OF FUNDS FOR CONSTRUCTION ACTIVITY. THIS AMOUNT DOES NOT FLUCTUATE WITH THE REQUIREMENTS OF SECTION 105(f). ALSO THE STATE'S ENGINEERING COST ESTIMATE SERVES

AS A GUIDEPOST FOR THE COST OF A PROJECT. MOST STATES WILL NOT EXCEED THIS ESTIMATE.

ACCORDING TO AN ABT STUDY ON THE IMPACT OF THE MBE SET-ASIDE REQUIREMENT ON THE LOCAL PUBLIC WORKS (LPW) PROGRAM OF 1977, IT WAS DISCOVERED THAT THE COST IMPACT TO THE GOVERNMENT WAS ESTIMATED TO BE 1.3 PERCENT, WHICH IS ABOUT EQUAL TO INCREASES ATTRIBUTED TO DAVIS-BACON.

WITH THIS IN MIND, THERE IS NO INDICATION THAT THE DBE AND MBE PROGRAMS RESULT IN ADDITIONAL COSTS TO THE FEDERAL-AID HIGHWAY PROGRAM.

(7) WHAT, IF ANY, EXPERIENCE HAVE YOU HAD WITH FIRMS THAT DO NOT APPEAR TO BE LEGITIMATE FIRMS? HOW CAN THE FRAUDULENT USE OF THIS PROGRAM BE PREVENTED?

BASED ON THE INFORMATION PROVIDED BY THE STATES AT EACH OF THE OVERSIGHT HEARINGS CONDUCTED BY MY SUBCOMMITTEE, FRONT COMPANY ABUSE HAS BEEN KEPT TO A MINIMUM. MANY STATES HAVE STRONG CERTIFICATION PROCEDURES WHICH ENABLE THEM TO WEED OUT INELIGIBLE FIRMS AT THE OUTSET.

THERE IS NO EVIDENCE TO SUGGEST THAT WIDESPREAD FRAUD EXISTS IN THE PROGRAM. THE NUMBER OF DOT AND DEPARTMENT OF JUSTICE CIVIL OR CRIMINAL SUITS FILED DOES NOT SUPPORT THE ALLEGATION THAT A WIDESPREAD FRAUD PROBLEM EXISTS.

TO ADDRESS THIS ISSUE, I INTRODUCED H.R. 1961 WHICH HAS BEEN PASSED BY THE HOUSE AND INCORPORATED IN H.R. 3500. THIS BILL INCREASES THE DOLLAR AMOUNT OF THE FINE FROM $5,000 TO $50,000 AND THE LENGTH OF IMPRISONMENT FROM TWO YEARS TO FIVE YEARS FOR THOSE FIRMS FOUND GUILTY OF BEING "FRONT OPERATIONS."

THE CASES THAT HAVE BEEN BROUGHT TO MY ATTENTION BECAUSE OF ALLEGED FRONT ACTIVITY I HAVE REFERRED TO THE DEPARTMENT OF TRANSPORTATION AND DEPARTMENT OF JUSTICE AND ASKED THAT THEY INVESTIGATE, MAKE A DETERMINATION AND APPRISE ME OF THEIR FINDINGS. TO DATE, I HAVE NOT RECEIVED A RESPONSE TO ANY OF MY INQUIRIES JUST INTERMITTENT UPDATES EXPLAINING THAT THE INVESTIGATION IS STILL ONGOING.

(8) HOW HAVE STATES WITH SMALL MINORITY POPULATIONS BEEN ABLE TO MEET DBE REQUIREMENTS?

MEETING GOALS IS NOT SOLELY CONTINGENT UPON THE SIZE OF THE MINORITY POPULATION OF A GIVEN STATE, BUT RATHER ON HOW CONTRACTS ARE AWARDED. SOME STATES WITH SMALL POPULATIONS HAVE MET OR EXCEEDED THEIR GOAL LEVELS BY BREAKING OUT CONTRACTS INTO SMALLER PORTIONS WHICH PROVIDE DBES THE OPPORTUNITY TO BID AS PRIMES.

REMEMBER DBE PARTICIPATION IS NOT LIMITED TO HIGHWAY CONSTRUCTION PROJECTS ONLY. DBE PARTICIPATION CAN BE COUNTED IN NON-CONSTRUCTION AREAS SUCH AS INSURANCE, BANKING, LEGAL WORK, ACCOUNTING, ETC.

IN SUMMARY, BASED UPON THE FINDINGS OF MY SUBCOMMITTEE'S INVESTIGATIONS, IT IS APPARENT THAT SECTION 105(f) HAS SERVED TO INCREASE THE PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISES IN THE MARKETPLACE. WITH THE COMBINED EFFORTS AND COMMITMENTS OF FEDERAL HIGHWAY AND URBAN MASS TRANSPORTATION ADMINISTRATIONS OF DOT, STATE HIGHWAY AND TRANSIT AUTHORITIES AND THIS SUBCOMMITTEE, THE PROBLEM AREAS IDENTIFIED -- OUR INVESTIGATION HAS DISCLOSED -- ARE BEING RESOLVED. IT IS MY RECOMMENDATION, THEREFORE, THAT THIS PROGRAM BE REAUTHORIZED IN ORDER TO ALLOW DBES AN OPPORTUNITY TO GROW AND EXPAND AND TO SOMEDAY PARTICIPATE IN A MEANINGFUL WAY IN THE REBUILDING OF THIS NATION'S INFRASTRUCTURE.

The following is a list of nonminority individuals/firms which have reported adverse (economic) impacts related to implementation of section 105(f) of the STAA of 1982.

Fontana Steel
P.O. Box 577
17190 Valley Boulevard
Fontana, California 92335
Donald G. Ware
Executive Vice President

Bates and Rogers Construction Company
600 West Jackson Boulevard
Chicago, Illinois 60606
John W. Rogers
Chairman, C.E.O.

John G. Palmer, Sr.
c/o Foundation Corporation
616 S. Ricketts Avenue
Bartonville, Illinois 61607

Adarand Constructors, Incorporated
P.O. Box 7670
3650 Lloyd Loop
Colorado Springs, Colorado 80933-7670
Randy M. Pech
President

National Barricade Company
1140 S. Kalamath
Denver, Colorado 80223
Dean Story
President

Warning Lites of Illinois, Incorporated
844 Kay Avenue
Addison, Illinois 60101
John C. VandeVelde
Vice President

Johnson Brothers Construction
P.O. Box 1002
Litchfield, Minnesota 55355
R. W. Johnson
President

Southern Seeding Service, Incorporated
P.O. Box 22092
4535 West Market Street
Greensboro, North Carolina 27420
Ralph D. Stout, Jr.

Coral Construction Company
P.O. Box 347
Wilsonville, Oregon 97070
Deane Clapperton
Vice President

Rhode Island Nurserymen's Association
339 Woodward Hall
Kingston, Rhode Island 02881
Mary Hellene
President

Jackson Construction, Incorporated
P.O. Box 5648
1106 Methodist Park Road
West Columbia, South Carolina 29171
K. W. Simons
Vice President

BEST COPY AVAILABLE

| | |
|---|---|
| Southern Construction Company<br>P.O. Box 667<br>Petersburg, Virginia 23804 | Gerald K. Moody<br>President |
| Joseph S. Tenke<br>Vice President<br>2129 Yvonne Street<br>Waukesha, Wisconsin 53186 | Century Fence Company |
| Decker Supply Company, Incorporated<br>3220 Commercial Avenue<br>Madison, Wisconsin 53714 | Stephen W. Decker<br>Vice President |
| Jones Brothers Dirt and Paving<br>Contractors, Incorporated<br>P.O. Box 3983<br>Odessa, Texas 79760 | J. W. Jones<br>President |
| J. L. Kent and Sons, Incorporated<br>P.O. Box 69<br>Spotsylvania, Virginia 22553 | Robert L. Kent<br>Secretary |
| Stephen C. DeWeese<br>4838 Hansen Court<br>Columbus, Ohio 43220 | |
| Ben Tom Corporation<br>6600 Huntly Road<br>P.O. Box 497<br>Worthington, Ohio 43085 | C. M. Gegenheimer<br>Chairman of the Board |
| T. Brown Constructors, Incorporated<br>P.O. Box 26508<br>Albuquerque, New Mexico 87125 | Ted F. Brown<br>President |
| Joseph J. Hock, Incorporated<br>5500 Belle Grove Road<br>Baltimore, Maryland 21225 | Joseph A. Burton<br>Chairman of the Board |
| Davis Concrete Construction Company<br>11633 S. Mayfield Avenue<br>Worth, Illinois 60482 | Charles F. Davis<br>President |
| J. H. Dowling, Incorporated<br>705 W. Madison Street<br>P.O. Box 308<br>Tallahassee, Florida 32302 | J. H. Dowling, Jr. |
| Hamilton Brothers Electric, Inc.<br>655 South Main<br>Springville, Utah 84663 | Gordon D. Hamilton<br>President |

| | |
|---|---|
| R.A.M. Construction Company<br>R.D. 1, Box 479 1/2<br>Frederica, Delaware 19946 | Yvonne E. Milton<br>President |
| Madden Contracting Co., Inc.<br>P.O. Box 826, Sibley Road<br>Minden, Louisiana 71055 | James D. Madden<br>President |
| Winchester Construction and Engineering Co., Inc.<br>P.O. Box 2005<br>Tallahassee, Florida 32316 | Jon Winchester, P.E.<br>President |
| Dallas L. Wolford<br>614 Charleston National Plaza<br>Charleston, West Virginia 25301 | |
| C. H. Barco Contracting Company<br>7587 Wilson Boulevard<br>Jacksonville, Florida 32210 | Charles H. Barco |
| Virginia Road and Transportation Builders Association<br>30 La Brook Drive<br>Richmond, Virginia 23225 | William H. Craig, Jr.<br>Executive Vice President |
| Beck Electric Construction, Inc.<br>P.O. Box 450<br>Sunbury, Pennsylvania 17801 | Jay H. Russell<br>Secretary/Treasurer |
| Lewis Construction Company<br>Box 2552<br>1025 11th Avenue North<br>Great Falls, Montana 59401 | G. A. Lewis<br>President |
| J. H. Dowling, Inc.<br>P.O. Box 308<br>705 West Madison Street<br>Tallahassee, Florida 32302 | J. H. Dowling, Jr. |
| Larson-Pugh, Inc.<br>P.O. Box 5156<br>Austin, Texas 78763 | Robert L. Pugh<br>President |
| Sharon N. Mutschler<br>212 E. Ninth Street<br>Watsontown, Pennsylvania 17777 | |
| Kentucky Guard Rail Co., Inc.<br>P.O. Box 416, Steel Drive<br>Elizabethtown, Kentucky 42701 | Robert B. Walker<br>Executive Vice President |

| | |
|---|---|
| Carl M. Weber Steel Services, Inc.<br>P.O. Box 288<br>Kutztown, Pennsylvania 19530 | Bruce C. Weber<br>Vice President |
| Buskerud Construction, Inc.<br>P.O. Box 126<br>Dell Rapids, South Dakota 57022 | Harold Skatrold<br>President |
| MICA Corporation<br>P.O. Box 14350<br>Fort Worth, Texas 76117 | L. C. Tubb |
| Taylor Construction Company, Inc.<br>9014 Parkhill Circle<br>Lenexa, Kansas 66215 | Everett J. Taylor<br>President |

NOV 18 1985

## STATEMENT OF JIM J. MARQUEZ
GENERAL COUNSEL
U. S. DEPARTMENT OF TRANSPORTATION
BEFORE THE SUBCOMMITTEE ON TRANSPORTATION
OF THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
REGARDING THE SECTION 105(f) PROGRAM OF THE
SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

NOVEMBER 19, 1985

Mr. Chairman and Members of the Subcommittee:

My name is Jim Marquez and I am General Counsel of the Department of Transportation. With me today is David Lukens, Special Assistant to the Administrator of the Federal Highway Administration (FHWA). On behalf of Secretary of Transportation Elizabeth Hanford Dole and Federal Highway Administrator Ray Barnhart, I would like to express to the Subcommittee our appreciation for your interest in our efforts to implement the Disadvantaged Business Enterprise (DBE) Program established pursuant to section 105(f) of the Surface Transportation Assistance Act (STAA) of 1982. The Department fully supports the purpose of this legislation, that is, ensuring that minorities and other socially and economically disadvantaged members of our society are afforded the opportunity to participate equally in contract opportunities resulting from our federally-assisted transportation programs.

In the letter of invitation to Secretary Dole, you indicated those issues you would like us to address.

## Capacity of DBEs and WBEs

The capacity of DBEs and WBEs in the highway construction industry has never been determined with any degree of confidence. The FHWA has relied on the individual States to project capacity in relation to establishing or achieving State goals. The number of DBE firms certified in a particular State together with some estimate of the ability of those firms to undertake highway contracts or subcontracts should provide some indication of the goal a State should set in order to comply with program requirements. State highway departments are the entities that determine eligibility and enter into contractual relationships with the construction firms, and thus, are in a position to determine a firm's capacity. Individual States have set DBE goals ranging from 5.5% to 14% and WBE goals ranging from 0.5% to 5% over the past two years, and have generally achieved these goals. This may provide a rough measure of DBE capacity.

In many States, DBE and WBE firms are included on certification lists whether or not they actually do highway construction work. In many cases, firms active in other areas of construction apply for certification in the highway construction area and then, for one reason or another, do not compete for highway contracts or subcontracts. Many of the certified firms are newly emerging companies, the capacities or abilities of which have not been determined through experience.

We view the DBE program as one that is intended to provide opportunities to develop capacity, as well as working with existing DBEs. Consequently, capacity is an ever changing phenomenon as new DBEs are established.

Earlier this year, the General Accounting Office (GAO) investigated the DBE program in six States -- Colorado, Florida, Illinois, New Hampshire, Maine, and North Dakota -- and reported that the data available indicated that capabilities exist among certified DBEs to perform 10 percent of the highway work needed by those States.

The capacity of DBEs to participate in needed highway construction is not present in every instance. Some States have experienced situations where capable DBE contractors are not available at the time contracts are let, or the availability of such contractors is affected by the location of the work and competing job opportunities. These conditions have been encountered in a number of States, and thus, were considerations in our approval of participation goals. In such situations we ask the States to fully document the problem and the good faith efforts in meeting their goals.

## Participation and Development as Prime Contractors

Currently there are 466 DBEs and 205 WBEs which are bidding as prime contractors for highway construction work. It should be noted, however, that of these firms 170 DBEs and 74 WBEs are bidding in only four states which have very active set-aside programs.

Because participation in prime highway contracting involves large capital investments, complex financial arrangements, and technical expertise, DBE and WBE firms have, in most cases, entered into the industry through subcontracting. Subcontracting allows these firms to develop industry experience and skills without the financial burdens and risks associated with prime contracting.

While the number of DBEs and WBEs competing as prime contractors is relatively small, the FHWA has been involved in various efforts designed to encourage initiatives to increase the numbers and to remove barriers to DBE/WBE participation. We are funding supportive services contracts through the States which provide technical and financial assistance to these developing firms. I will briefly discuss these activities later in my testimony.

## Effects of DBE Program on Non-DBE Specialty Contractors and WBEs

The FHWA has received in past years considerable correspondence from non-DBE specialty contractors and other firms who complain that the DBE requirements are forcing them to lose business or are even driving them out of business. This correspondence alleges that non-DBE specialty contractors with lower bids than DBEs are denied the contract. It is difficult to judge fairly the weight which should be given to individual complaints of adverse impact, some of which may stem from disappointment at losing competition to new entrants into a formerly less open market, and to the overall effort of the STAA, which increased total contract dollar and opportunities by 50 percent for the entire industry. In most cases, specialty work is performed through subcontracts. This requires consideration of determinations made by prime contractors in entering into subcontracts. Non-DBE specialty contractors suggest that the 10% DBE provision impacts heavily in highway construction because such construction is not condusive to significant subcontracting opportunities. Thus, these complainants assert that about 90% of an average highway construction contract is done by the prime contractor leaving only 10% for subcontractors. As a result, they claim many non-DBE subcontractors are shut out from bidding opportunities.

Women-owned businesses if socially and economically disadvantaged can qualify on an individual basis under the statutory program. The statutory program left unchanged the existing DOT regulatory program requiring good faith effort for WBEs. We remain committed to the WBE program and we intend to continue encouraging the States to take affirmative, non-discriminatory steps to increase participation of WBEs in federally-assisted work.

## DBE and WBE Certification Process

The Department regulations provide minimum standards which the States must follow in certifying DBE and WBE firms. The process must be compatible with their procurement and contract award procedures. We have distributed to the States guidelines on eligibility criteria, certification and verification procedures. We have been striving to provide for maximum uniformity. Consistent with the concept of a federally-assisted, State administered highway program, we do believe that the primary responsibility for certification remains with the States.

At our urging, the States have been focusing more attention to the certification and verification proce Manpower and other resources dedicated to this task have been greatly increased at the State level.

We believe that the screening programs undertaken by the states have been effective in preventing front firms from taking advantage of the program. There is abuse, and I doubt that we will ever eliminate all abuse any more than the IRS eliminates all cheating on taxes. But fronts are not taking over the program, and we believe that the vast bulk of the funds counted toward our DBE and WBE goals goes to legitimate firms.

In addition to screening and enforcement, another important way to prevent abuse is an emphasis on and a recognition of good faith efforts to afford equal contracting opportunities to DBEs. We continue to stress that this is not a quota program, and to emphasize the responsibility of the States to maintain competitive standards in administering the program and the obligation to accept good faith efforts in lieu of goal achievements. Consequently, a combination of close monitoring and enforcement to prevent and correct profiteering through pass through arrangements, and reasonable requirements focusing on opportunities and good faith efforts should go a long way toward reducing the incentive to create fraudulent DBEs and WBEs.

## Financial and Technical Assistance to DBEs and WBEs

We have found that DBE and WBE firms, like most emerging companies, are in need of technical assistance in areas such as prequalification, estimating, bid preparation, plan reading, planning, business management, accounting, and recordkeeping. These companies are often in need of bonding and financial assistance.

Initiatives undertaken by the Department should help address these needs. The FHWA is currently providing this type of assistance through the supportive services program. The STAA of 1982 authorized FHWA to finance supportive services programs to help "minority businesses . . . achieve proficiency to compete, on an equal basis, for contracts and subcontracts." Since this Administration came into office, FHWA has allocated a total of $30.5 million for this program, including $8.4 million for fiscal year 1985.

The supportive services program has helped DBEs understand the States' contract award processes, improved communications on contracting opportunities, provided technical assistance, and established "networks" among DBEs and sources of contracts. Many innovative approaches have been implemented, including workshops, seminars, one-on-one consulting, and assistance from State highway personnel.

The Department's Office of Small and Disadvantaged Business Utilization is also presently funding 14 Program Management Centers (PMCs), and one Native American Business Enterprise project. The PMCs are a national network of professional management consulting firms which are supported by the Department for the purpose of providing assistance to DBEs in pursuit of business opportunities with the Department and its financial assistance recipients. The PMCs provide assistance by identifying DBEs, and performing outreach, marketing, referral, follow-up and technical assistance. Technical assistance consists of bid proposal development, cost estimating, loan packaging and assistance in obtaining bonding. This program, since its establishment in FY 1982, has consistently provided valuable assistance to DBEs involved in business opportunities resulting from the STAA of 1982.

As you know, DBEs historically have had difficulties in obtaining surety bonds and financial assistance. To assist DBEs in overcoming such barriers, in December of 1982, the Department created bonding and short-term loan programs with Fireman's Fund Insurance Companies and the Atlantic National Bank. These programs have been successful in providing DBEs with the bonding and financing needed to perform transportation-related projects.

Over the two and one half years ending June 30, 1985, 88 bond approvals were made. Final bonds have been issued to cover 33 contracts with bonded amounts nearly $3.0 million. Other approvals include 37 bid bonds and 18 applications for bond readiness. Also, from December 1982 to October 1985, 64 short-term loan dispersals have been made for approximately $7.2 million. These loans were made to DBEs at the current prime rate. This is a unique feature of the Department's short-term loan program, since many other loan programs make loans available to DBEs only at interest rates above the prime.

### Additional Costs Resulting from DBE Program

The allocation of resources at the State level to establish adequate certification and verification processes, as well as the steps taken to provide assistance to DBEs and develop innovative procedures, have entailed added costs. There have also been allegations that prime contractors have awarded subcontracts to DBEs in order to meet contract goals, even though the DBEs' quotes were higher than non-DBE competitors. This could have the effect of raising bid prices on contracts where DBE goals are included although it is far from certain that this has happened in any systematic way or that unreasonably high prices for work have resulted.

There is a problem in quantifying these additional costs. We do not have the data available which would permit us to arrive at exact figures or even accurate estimates.

### Fronts and their Prevention

The Department continues to believe that effective enforcement of the DBE program's eligibility requirements is a key part of ensuring that the program will achieve its purpose. Keeping ineligible "front" firms out of the program is essential to maintaining the program's integrity and credibility.

The first and most important part of this responsibility falls upon the State and local governments receiving financial assistance from the Department, who must screen applicants for DBE certification. This screening process has succeeded in preventing the participation of a substantial number of ineligible firms.

I have already discussed the aggressive actions taken by the States on certification and the resulting decrease of fraudulent firms benefitting from this program. A few figures will further illustrate this point. According to a survey conducted in June of this year, the States took certification actions on 6,084 firms during fiscal year 1984 and the first quarter of fiscal year 1985. In all, the States have denied DBE certifications to 906 applicants. This means about 15 percent of all firms that applied were denied certification.

We also require the States to review certified firms annually. The States conducted recertification reviews of 4,803 firms in fiscal year 1984 and the first quarter of fiscal year 1985, with 403 firms denied recertification -- or about 8 percent of those reviewed. In the same period, the States decertified 359 firms following reviews or investigations conducted outside the normal process.

The Department maintains a certification appeal process for firms that believe they had been wrongly denied certification or decertified by recipients. As of November 6, 1985, the Department's Office of Civil Rights has decided 499 of 554 appeals it has received. Of this number, only 40 (or about 8 percent) were decided in favor of the appellant firms. Insofar as the cases appealed to the Department are representative of recipient certification actions, this low percentage of reversals suggests that recipients' judgments that firms should not be certified are generally reliable.

The participation of ineligible firms in the DBE program is an abuse of the program, and could sometimes involve actual fraud as well. Consequently, the Inspector General's office is often called upon to independently investigate matters related to DBE certification.

In some cases, investigations have resulted in referrals for prosecution at the Federal or State level. In other cases, referrals have been made to the agency for possible debarment action. These actions have also provided assistance in the general administration of the programs.

## States with Small Minority Populations

While on this subject, I would like to address another question posed by the Subcommittee concerning States with small minority populations and their ability to meet DBE requirements. To begin with, the Department's regulations require only that a State set reasonable overall goals annually. If the goal is less than ten percent, the State is required to submit justification. Small minority population within a State has been accepted as a factor justifying a goal of less than ten percent, but not in and of itself. A State must also consider the availability of DBEs in neighboring States, and explain what efforts were taken to attract such firms. In some cases, genuine efforts to attract out-of-State contractors have not been fully successful. The principal reasons in such cases are that the out-of-State DBEs are already working at or near capacity or the site of the project is too inconvenient. Problems are also sometimes encountered when there are non-DBE firms available within the State to do the work. Four states have requested goals of less than 10% for FY 86. Three have been approved and one is pending.

## Initiatives to Promote Participation and Ensure Program Integrity

I would like to discuss other recent efforts that have been undertaken to facilitate DBE/WBE participation.

The FHWA is confident that our day-to-day monitoring and oversight of the DBE program provides significant guidance to the States which facilitates the administration of the program and leads to enhanced DBE participation. Recently, we issued policy guidance clarifying the concept of "good faith efforts"; and offering assistance in the administration of contracts subject to section 105(f). On a periodic basis, the FHWA has issued advice to field offices providing examples of various innovative procedures and programs being used by States to increase opportunities for DBEs/WBEs. Among these are the establishment of development credit funds with local banking institutions; increasing the minimum level of contract value for required bonding; elimination or modification of prequalification requirements; allowances for documented administrative costs by prime contractors subcontracting to DBEs; compensation for DBE training and technical assistance provided by prime contractors; and, the use of mobilization costs and quick payment provisions in DBE subcontracts.

In response to a specific question posed in the invitation letter as to whether assistance to DBEs should be counted toward the 10 percent goal, the FHWA has adopted the policy of counting such assistance to DBEs only to the extent that it involves a consulting contract with a DBE firm.

## Bonding Demonstration Program

In addition to these initiatives, we were directed by Congress to undertake a bonding demonstration program, for which $5,000,000 has now been appropriated to come out of FHWA general operating expenses. The States of New York, Pennsylvania, and Florida were selected as demonstration States at the suggestion of the House Appropriations Committee. Our plan is to combine technical assistance for

DBEs in those States, specifically in the bonding area, with an increased capacity for direct bonding of DBE highway contractors through augmentation of an existing program administered by the Department's Office of Small and Disadvantaged Business Utilization.

We expect the demonstration program to be operational in all three States by the beginning of 1986.

## DBE and WBE Participation

In order to assist the Subcommittee in its understanding of the extent of this program, I would like to provide for the record a table of Federal-aid contract totals for fiscal years 1984 and 1985. You will note that complete data for fiscal year 1985 is not yet available, however, a table containing the first 9-month totals has been prepared. To supplement this information, I am also providing a table showing the contract values of all States and the portion of those figures going to DBEs and WBEs for the same periods.

This information reveals that during fiscal year 1984, the States obligated more than $9.34 billion on federally-assisted contracts. Of that amount, $1.2 billion was awarded to DBEs and $0.3 billion to WBEs, as prime contracts or subcontractors. In other words, approximately 13 percent of our contracting dollar actually went to DBE firms, and 3 percent to WBEs. This pace has continued during the first 9 months of fiscal year 1985. The States have awarded contracts amounting to about $8.25 billion, of which nearly $1.1 billion has gone to DBE firms, and $0.24 billion to WBE firms. This represents a nationwide participation of over 13 percent for DBEs and of 2.86 percent for WBEs in the first three quarters of fiscal year 1985.

## Study on Impacts of DBE Program

We have been concerned that we do not have a comprehensive analysis of the effects of the DBE program. Earlier this year, we awarded a contract for a study to identify and assess beneficial and adverse impacts of DBE participation requirements of the Federal-aid highway program. The scope of work for this study includes the identification of significant measures to determine the effects of the DBE program on the contracting community; the location of data sources useful in providing the measures; the collection of data and quantification of identified measures; and, analysis of the data in order to assess any positive and negative impacts of the DBE program.

The Abt Associates of Cambridge, Massachusetts was awarded the competitive contract on April 1, 1985, in the amount of $186,895. This firm is scheduled to deliver its final report on the study on January 14, 1986.

The Abt Associates has conducted on-site visits in 9 States in order to obtain information on DBE program impacts from State and Federal highway personnel, DBE and non-DBE firms, and supportive services agencies. The States were selected to illustrate program impacts under a variety of circumstances, including differences in program size and approach, minority population, and geographic location.

The contractor is presently attempting to gather additional information to complement existing data sources. At this time, we are unable to report conclusive findings resulting from the study.

## Conclusion

The Department believes that our efforts and those of the States, as has been documented in the various congressional hearings on these programs, have fulfilled the intent of section 105(f) of the STAA of 1982 and opportunities for disadvantaged business have been enhanced significantly. We also recognize that we have been faced with many legitimate problems during the implementation of this program. We have been doing our utmost to overcome these problems. We will continue our efforts with the States to monitor the program and to address current and future problems.

This concludes my prepared statement. I will now answer any questions you may have.

AMERICAN ASSOCIATION OF STATE HIGHWAY
AND TRANSPORTATION OFFICIALS

[illegible] President
etary
Department
portation

FRANCIS B. FRAN
Executive Director

STATEMENT BEFORE THE
TRANSPORTATION SUBCOMMITTEE OF THE
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Relating To

# A REVIEW OF THE SECTION 105(f) PROGRAM OF THE 1982 STAA

by

FRED D. MILLER
Director, Oregon Department of Transportation

and

Member of the Executive Committee, the American Association of
State Highway and Transportation Officials

November 19, 1985

Founded in 1914, AASHTO represents the departments concerned with highways and transportation in the States, the District of Columbia, and Puerto Rico, to foster the development, operation and maintenance of an integrated national transportation system. The active members of AASHTO are the duly constituted heads and other chief directing officials of the member highway and transportation agencies.

Mr. Chairman, my name is Fred Miller, and I am the Director of the Oregon Department of Transportation. I am also a member of the Executive Committee of the American Association of State Highway and Transportation Officials (AASHTO), and a member of AASHTO's recently created Task Force on the Disadvantaged Business Enterprise Program.

I am appearing here today in response to the request of this Committee that AASHTO provide you with testimony regarding the Section 105(f) program included in the Surface Transportation Assistance Act (STAA) of 1982, which after first being identified as the Minority Business Enterprise (MBE) program has come to be known as the Disadvantaged Business Enterprise (DBE) program. While your request for testimony was addressed to our President, Thomas Larson, it was not possible for him to appear on November 19; accordingly, I have been designated to formally represent AASHTO.

In addition to representing AASHTO, I am also appearing today in my capacity as Director of the Oregon Department of Transportation, again in response to your invitation.

Mr. Chairman, before turning to the eight specific questions on which you have requested testimony, let me first generally describe the approach taken by AASHTO and its member departments to the DBE program following the passage of Section 105(f) of the STAA of 1982, and our subsequent actions to date.

The departments of highways and transportation that comprise AASHTO are, of course, public agencies, and they are responsible for the operation of the Federal-aid highway program within their respective states. In addition, our departments are also often involved in the programs of the Urban Mass Transportation Administration, and with other Federally-aided transportation activities. If the provisions of Section 105(f) were to be implemented successfully, it thus fell largely to the member departments of AASHTO to do so. Following the enactment of the STAA in January, 1983, the states accordingly proceeded to work with the Federal Highway Administration and the U.S. Department of Transportation to begin implementation of Section 105(f). In the ensuing two years and ten months, Mr. Chairman, the goals established by Congress have been essentially met in all states.

While the goals set by Section 105(f) have been and are being met, it has not been an easy task to accomplish. Section 105(f) presented a number of procedural and practical problems, which our member departments have worked in good faith to resolve. After an initial startup period for the program, a number of issues surfaced that needed to be addressed. Accordingly, a series of regional seminars were organized jointly by AASHTO and the Federal Highway Administration, to which key persons from the states, the FHWA, the DBE contracting community and others from the private sector were invited. Those seminars provided considerable information, and helped many of our member departments to improve their DBE programs.

AASHTO has also done surveys of our member departments on the DBE program, designed to identify problems and the approaches taken to their solution in the several states, and to obtain overall information of use in evaluating the DBE program. The results of those surveys have been reported to the states, and have been utilized to further refine state DBE programs. Mr. Chairman, we recently provided to your Committee a copy of the results from the most recent of those surveys, titled "Survey On Impacts of Ten Percent Minority Business Requirement of 1982 Surface Transportation Assistance Act (STAA)". The results of this survey were compiled in July, 1985, and another copy is being submitted with this testimony.

After Section 105(f) of the STAA had been in effect for several months and our member departments had gained some operating experience under it, the AASHTO Policy Committee approved a Policy Statement on the MBE (now DBE) program, a copy of which is attached. This Policy Statement is still in force, and among its provisions states that:

> "The member departments of AASHTO have been and remain committed to increasing the participation of socially and economically disadvantaged individuals in programs of their departments. The requirement of Sec. 105(f) is accepted as both a challenge and a minimum goal, in the spirit it was enacted by the Congress. The member departments of AASHTO commit themselves to taking every reasonable action within their command to meet this challenge and goal by the earliest possible date, including engaging in efforts to locate, develop and encourage socially and economically disadvantaged individuals and their business enterprises, and extending assistance so that they can achieve satisfactory levels of participation. In meeting this commitment, every effort will also be made to treat all persons with fairness and equity."

Mr. Chairman, we believe the record will show that the AASHTO member departments, including my Oregon Department of Transportation, have abided by this Policy Statement. But while we have been successful in meeting the goals set by Section 105(f), problems and frustrations have been encountered within some of our member departments, and within the contracting industry. Because of these problems and frustrations, AASHTO and our member departments are continuing their efforts to improve implementation of the DBE program.

We are acutely aware of the concerns within the highway contracting industry about the DBE program, and the belief among some contractors that it has been administered unfairly in some states to the detriment of long established contractors, especially in the area of so-called specialty contracting. We also know that despite the best efforts of our member departments and the private sector to date, in many states the number of qualified DBE contractors remains very small. Beyond this, we also are aware of allegations that in some instances DBE requirements are being met by the use of false fronts and other improper activities, and many of our states are taking or are planning actions against these. These and other issues in the DBE program concern me and the other chief administrative officers of our member departments, and as a result the DBE program continues to receive much of my and their attention.

While many problems do exist, however, the record shows that in many states there has been measurable growth and development of the minority business community - one of the goals of Congress in enacting Section 105(f).

There are some within the private sector and AASHTO who believe the Section 105(f) program has encountered so many problems that it should not be included in any bill extending the highway and transit programs, and indeed a recommendation to this effect was adopted this summer by the Executive Committee of the Joint AASHTO-Associated General Contractors-American Road and Transportation Builders Association Committee. We are aware that some have misunderstood this action, as constituting the adoption by AASHTO of a policy position that the DBE program be ended. Mr. Chairman, because this misunderstanding has been printed in some national publications, let me set the record straight.

The Joint AASHTO-AGC-ARTBA Committee arrangement includes an Executive Committee, which meets annually to consider matters of joint interest in the Federal-aid highway program. The Executive Committee is comprised of representatives of the three sponsoring organizations, including AASHTO. With respect to policy recommendations and other actions of major significance, the Joint Committee's Executive Committee has no authority to commit the three member organizations; rather, AASHTO, AGC and ARTBA must individually ratify such recommendations of the Joint Committee, before they have any official standing within those organizations.

The negative recommendation of the Joint AASHTO-AGC-ARTBA Committee regarding the DBE program was reported to the AASHTO Executive Committee and Policy Committee during our 1985 Annual Meeting in Seattle, Washington, but was not adopted as AASHTO policy. Instead, on October 13, 1985 the AASHTO Policy Committee adopted Resolution PR10-85, "Establishing a Task Force on the DBE Program". As is required for such policy resolutions, Resolution PR10-85 was approved by more than two-thirds of all our member departments, and a copy thereof is attached.

Mr. Chairman, the Task Force called for by Resolution PR10-85 has been established, and a list of its membership is also attached. It is partly because I am a member of that Task Force that I was requested to appear here today, on behalf of AASHTO. Since Resolution PR10-85 represents the latest official pronouncement by AASHTO on the Section 105(f) DBE program, let me briefly quote from it:

> "AASHTO recognizes the value of encouraging greater participation of "Disadvantaged Business Enterprises" (DBE's) desiring to become part of the transportation industry."
>
> "AASHTO believes that Section 105(f) of the 1982 Surface Transportation Assistance Act (STAA) was enacted with the intention of providing a practical and beneficial program for achieving this goal."
>
> "However, the years of experience with this program indicate significant problems as documented by a recent survey conducted by the American Association of State Highway and Transportation Officials."

The Resolution then enumerates eight specific problem areas, and charges the Task Force, of which I am a member, to evaluate each of these problem areas and report back to the Policy Committee at its February, 1986 meeting with findings and recommendations. The survey referred to in the Resolution is the one dated July, 1985 that I have identified earlier in this testimony, a copy of which is being submitted with this testimony.

To summarize AASHTO's current position on the DBE program, then, AASHTO and its member departments are continuing to work toward successful implementation of the DBE program established by Section 105(f). We have a newly appointed Task Force that is just beginning its efforts to analyze in depth a number of the problems that have been encountered in the DBE program. At least until such time as that Task Force completes its work and reports back to the AASHTO Policy Committee in February, AASHTO is not in a position to give specific recommendations on the DBE program beyond the policy statements it has already adopted. Given an understanding of our situation and the limitations it places upon our response, Mr. Chairman, let me now address the specific questions you have addressed to AASHTO.

(1) What is the capacity for Disadvantaged Business Enterprises (DBEs) and Women Business Enterprises (WBEs) for highway construction work?

Mr. Chairman, AASHTO does not have definitive statistics relating to either the total number, or the "capacity", of either DBE's or WBE's, although we have collected some information with regard to DBE's. To our knowledge, there are no truly reliable national statistics for either WBE's or DBE's concerning highway and transportation construction firms, in part because of the difficulty in defining and evaluating "capacity", and in part because of the lack of any organized efforts by anyone to collect the information. For example, the 1982-83 edition of the "Statistical Abstract of the UnitedStates" as published by the U.S. Department of Commerce contains some very generalized information regarding minority owned business firms, but it is simply not possible to derive any meaningful information from these statistics regarding highway contractors, let alone their "capacity". The 1985 edition of the "Statistical Abstract of the United States" omits even the limited data found in the 1982-83 edition.

Within each state, our member departments now have a reasonable understanding of the number of "qualified" WBE and DBE firms that exist, but it is very difficult to measure their "capacity". Some general observations are possible, however. We know that the passage of Section 105(f) resulted in the formation of a significant number of new DBE contractors firms, concentrated in specialty sub-contracting areas, which are in addition to those firms resulting from the efforts of the states to increase minority and WBE contractors that occurred before the 1982 Act; some of these firms have already failed, and others probably will. The formation and dissolution of DBE's and WBE's has been rather volatile for the past several years, which contributes to the problem of accumulating accurate and meaningful statistics.

Our July, 1985 survey addressed this issue in general terms. When the states were asked if there were sufficient numbers of qualified minority construction firms in their state at the time the 1982 STAA was enacted to satisfy a 10 percent DBE program, 21 replied "yes" and 28 "no". Of the 28 responding "no", it was reported that, on average, there were enough existing firms at that time to meet a 5% national DBE goal. This percentage varied considerably in AASHTO's four regions, as follows:

| | |
|---|---|
| Region I (Northeast) | 10.1% |
| Region II (Southeast) | 4.1% |
| Region III (Midwest) | 3.9% |
| Region IV (West) | 3.8% |

We also asked the states to report on whether the availability of minority business qualified to work on Federal-aid projects had increased in their state since the enactment of Section 105(f). Of 49 states responding to the question, 37 reported an increase, 12 said that availability was about the same, and none reported a decrease. The average percentage increases reported by the four AASHTO Regions were as follows:

| | |
|---|---|
| Region I (Northeast) | 150 % |
| Region II (Southeast) | 30.5% |
| Region III (Midwest) | 110.5% |
| Region IV (West) | 60.2% |

Another survey question asked the states if they knew of qualified minority firms which were not interested in performing work on Federal-aid highway construction projects, and 32 states said "yes", while 17 reported "no". The national average was some 15 firms per state, and the attached report provides comments from the states as to why these firms do not want to do highway work.

Unfortunately, we have not gathered similar information with regard to WBE availability. However, overall the states have continued to work on providing WBE opportunities, while seeking to meet the statutory requirement for DBE's imposed by Section 105(f).

(2) Currently, how many DBEs and WBEs are bidding as prime contractors for highway construction work? How can more DBE and WBE firms be developed as prime contractors?

Mr. Chairman, as with the first question, there is very little hard data available regarding the number of DBE and WBE prime highway contractors. Some limited data was gathered on this subject by AASHTO in our 1984 survey of the member departments, titled "Update Survey of State Actions for Implementing Sec. 105(f) of the Surface Transportation Assistance Act of 1982". A copy of the May 1, 1984 report on that survey is also being submitted with this testimony, and question 9 therein reads:

"9. Of your total DBE participation (dollar value) for FY 1983, what percentage was for DBE prime contracts, and what percentage was for DBE subcontracts?"

The response to Question 9 is presented in the May, 1984 report on page 15, the data being listed anonymously by state. The data shows a wide variance over the nation. Two states reported that over 60% of the dollar value of their DBE contracts in FY 1983 went to prime contractors, five states reported volumes between 30% and 60%, six states reported volumes between 10% and 30%, and 16 states reported volumes under 10%. Of the 46 states responding to Question 9, only 10 states reported that 100% of their DBE dollar volume for FY 1983 was exclusively with subcontractors.

We believe, Mr. Chairman, that the data for FY 1984 would be similar to that collected for FY 1983. What this data makes clear is that there are qualified minority prime contractors in a number of states.

The second portion of your question asks how can more DBE and WBE firms be developed as prime contractors. This is a question being asked in many of our member departments, and we believe there is no one answer that will apply in all states, for all DBEs and WBEs. If today's minority sub-contractors are to become prime contractors, there are two basic problem areas that must be addressed - capital and personnel.

Typically, it takes considerably more in the way of capital to be a prime contractor than a sub-contractor. Since a new DBE or WBE firm will usually have limited capital, it therefore often commences contracting activity in the specialty areas where capital demands are less. For example, it takes considerably more capital to be a paving contractor, than a contractor installing guardrail. As to how minority sub-contractors can accumulate sufficient capital to become a general or prime contractor, this is a problem that is not new or unique to the construction industry. Capital can be acquired through profits on earlier jobs, through mergers with other companies, by borrowing, and in other ways. Often, the ability to borrow leads directly into the second problem area, that of personnel.

The management of a highway contracting organization requires many skills, including knowledge of estimating and bidding, the employment and administration of managers, technicians and laborers, and the overall financial management of the business. These skills are not easily learned, and are more complex for a prime contractor than the specialty contractor. Thus, as new DBE and WBE contracting capacity has been created, it has thus far been concentrated in the sub-contracting area where personnel demands are less. In time, it can be expected that as expertise is acquired, many of today's subcontractors will become prime or general contractors if they so desire. To help this process along, we believe in AASHTO that wider usage of the mentor-protege concept, the formation of partnerships between new DBE and WBE firms and established contracting organizations, holds great promise.

Within AASHTO's member departments, there are many efforts underway to help increase the capacity and expertise of minority contractors. This is an issue that will be further reviewed by the new AASHTO Task Force of which I am a member.

To summarize, Mr. Chairman, time and experience should serve to increase the number of DBE and WBE firms that become prime contractors for highway construction work, assuming that sources of capital can be established. The mentor-protege concept offers considerable promise to facilitate this activity, and actions taken by our member departments should help the process along.

(3) What effect has the Section 105(f) program had on non-minority specialty contractors and WBEs? If there have been adverse effects, how should they be addressed?

We are aware of no hard statistics that detail the impact of Section 105(f) on non-minority specialty contractors, or on WBEs. However, we have heard reports from many in the private sector that there has been such an impact, reports that have been confirmed by some of our member departments.

Returning to our July, 1985 survey, the member departments were asked if they knew of specialty subcontractors who are being, or have been, forced out of business because their discipline is one in which minority firms are largely being used to meet contract minority business goals. Of 48 responding states, 12 responded "yes". The comments from responding states found on pages 31 through 34 of the survey report enlarge on the "yes" and "no" responses, but we have no available detailed statistics.

Part of the reason that specialty contractors have borne a large share of the implementation action under Section 105(f) is that the work to be performed in specialty contracts meets the minimal capital and experience level often present in a newly-formed DBE or WBE firm. Meeting the immediate 10% goal established by Section 105(f) required the immediate creation of DBE firms in most states, and the specialty sub-contracting area offered the best opportunity to create the necessary new contracting capacity.

Beyond this, many prime or general contractors choose to keep to themselves the paving, grading and other major work elements of a highway contract when responding to contract lettings where a DBE and WBE goal has been set, resulting in their placing the burden of meeting the goal on sub-contractors, especially in the specialty areas.

It is difficult to address this problem, but many member departments are attempting to do so. If and when a large number of minority sub-contractors become prime contractors, the problem will diminish. Until then, innovative approaches to defining work to be contracted are being engaged in by some states, designed to alleviate the impact of Section 105(f) on specialty contractors.

(4) What kind of certification process for DBE and WBE firms should be required? Should the process be uniform for all States?

Mr. Chairman, our May 1, 1984 survey report examines several areas with regard to certification of DBEs and WBEs, and we believe this information may be of help to the Committee.

All of the states have now adopted procedures for certification, based upon the guidelines established by the U.S. Department of Transportation and the Federal Highway Administration. While some refinement of these procedures might be useful, we believe that, generally, they are functioning as intended.

As to whether or not there should be a uniform process for all states, we doubt if this is practical, given the different laws and procedures in the states.

Mr. Chairman, it is probable that some discussion of the certification process will arise during the work of our Task Force. If we have any recommendations to offer in this area, we will be pleased to advise the Committee.

(5) What kinds of training, financial or other technical assistance are needed by DBE and WBE firms? Should this kind of assistance qualify towards the ten percent goal?

Mr. Chairman, our member departments have been and are providing considerable technical assistance to DBEs and WBEs. In our May, 1984 survey a total of 44 states reported that they now use supportive service programs, with 20 states reporting them to be very effective, and 23 somewhat effective.

Among the kinds of supportive services offered by the States are:

-helping prime contractors to locate DBEs and WBEs
-helping DBEs and WBEs with plan analysis and bid procedures
-providing DBEs and WBEs with engineering assistance
-providing business management assistance to DBEs and WBEs
-providing employee training to DBEs and WBEs
-helping to locate financing, and assistance in bonding

These and other techniques will be reviewed by our Task Force, and we may have specific recommendations to offer in February. Some states are offering an extensive array of supportive services, other less. Further, in some states, agencies other than the highway and transportation departments are involved. It also needs to be understood that by law, certain services are not offered DBEs and WBEs in some states.

In addition to the help provided DBEs and WBEs directly by member departments, many prime or general contractors are also providing assistance to minority contractors. This activity is encouraged by many states, and has often proven to be effective.

With regard to whether or not this kind of assistance should qualify toward the ten percent goal, AASHTO has not taken a position thereon as of now. However, the DBE Task Force will be exploring options for providing technical assistance.

(6) What, if any, additional cost does the Section 105(f) program add to the Federal-aid Highway program?

Mr. Chairman, once again there are no hard statistics available to respond to this question. The only information AASHTO can offer is drawn from two questions in our July, 1985 survey.

The first question asked our member departments if they believed Section 105(f) had increased costs of Federal-aid highway projects. Of the 49 states responding to the questionnaire, 33 said "yes", and 10 "no".

A second question asked of those who had replied "yes": what did they believe the percentage impact to be? The national average was 5%, ranging from a low of 3.5% in AASHTO Region IV (West) to a high of 7.4% in Region III (Midwest).

The source of added costs can be traced to several factors, including the fact that DBEs or WBEs sometimes receive sub-contracts even though their bid is substantially higher than non-minority firms; the additional solicitation and administrative costs placed on the prime or general contractor in order to meet the DBE and WBE goals; and the apparent practice of some prime or general contractors to include an amount in their bids in anticipation of possible non-performance by the minority firm.

There are several reasons for the lack of hard data in this area, including the inability of the states to determine with precision why a prime or general contractor organisation has priced its bid in a particular way. Further, in some states this is largely a non-issue, since state minority requirements or existing practice exceed the requirements of Section 105(f). But although hard numbers are not available, from all reports it is reasonable to conclude when looking nationwide that Section 105(f) has increased the cost of Federal-aid highway projects.

(7) What, if any, experience have you had with firms that do not appear to be legitimate firms? How can the fraudulent use of this program be prevented?

Speaking first for AASHTO, we have no specific data or experience regarding non-legitimate minority firms. We have heard reports of investigations in several states indicating that problems may exist, but we do not have the details thereon.

As to how fraud can be prevented, several states have engaged in investigative work to verify information provided in the certification process. In several instances, these investigations have identified improperly certified firms.

Perhaps I can best respond to this question by relating our experience in the Oregon Department of Transportation.

In Oregon, we believe that the MBE certification process is an important element of this program. On the one hand, if certification standards are too rigid, the applicant firms may object to the scrutiny necessary to meet the program requirements. However, we have found that without a careful and thorough review of certification documentation, we run the risk of certifying firms who do not meet the requirements and more importantly the original intent of the program.

To my knowledge, Oregon is the first State to adopt a single MBD and WBE certification program for use by all public jurisdictions in the state. The mandated program in our department which will begin on January 1, 1986. Today, in Oregon, at least four different local or state jurisdictions independently certify eligible MBE/WBE firms. Beginning in January, 1986, Oregon Department of Transportation certifications will be recognized by all our public bodies involved in MBE/WBE programs.

This action will minimize problems in two areas. First, the firm seeking certification will only need to apply to one agency in Oregon, instead of four or more. Secondly, we will eliminate the problem of various jurisdictions using different certification standards to determine eligibility for program participation. We intend to work closely with the other jurisdictions to make sure the criteria we use for certification will prevent abuse of the program by firms who are not eligible to participate.

(8) How have states with small minority populations been able to meet the DBE requirements? What, if any, problems have they had in attracting out-of-state DBE firms?

Mr. Chairman, AASHTO again does not have first-hand information sufficient to properly respond to this question. But from reports we have received, we know that in several small states they undertook an intense effort to develop and certify new DBE contractors. In some small states, resort was also made to DBE contractors brought in from other states, although this often is a difficult task.

There are several problems and difficulties that often must be solved in using out-of-state contractors, including the desire and ability of the sub-contractor to travel to the state; the necessity to meet procedures of the host state; and, in some instances, the need to overcome the opposition of the political structure and traditions of the host state. Despite these problems, some states have successfully utilized this approach.

It should also be noted that in some small states the total number of available DBE and WBE contractors is very small. Thus, if one or more of those firms should decide to go out of business for some reason, the state would then be faced with a major problem.

Mr. Chairman, we hope that our testimony and these responses to your specific questions will assist your Committee as it considers the future of the Section 105(f) program. As the work of our AASHTO DBE Task Force unfolds over the next several months, we will be pleased to keep you informed of any recommendations that we believe may be of help to you. We will also endeavor to respond to any further questions or requests the Committee may have.

AMERICAN ASSOCIATION OF STATE HIGHWAY
AND TRANSPORTATION OFFICIALS

THOMAS D. LARSON, President
Secretary
Pennsylvania Department
of Transportation

FRANCIS B. FRANCOIS
Executive Director

## SUMMARY RESULTS OF MAY, 1985

## SURVEY ON IMPACTS OF TEN PERCENT MINORITY BUSINESS REQUIREMENT

## OF

## 1982 SURFACE TRANSPORTATION ASSISTANCE ACT (STAA)

Summarizing Surveys Returned From
49 Member Departments of AASHTO

July 19, 1985

## PREFACE

The survey questionnaires used to produce this report were sent to each of the 52 member departments of AASHTO, and in format closely paralleled similar survey questionnaires recently circulated among their membership by the Associated General Contractors and the American Road and Transportation Builders Association. The survey within AASHTO was conducted under the sponsorship of the AASHTO delegation to the Executive Committee of the AASHTO-AGC-ARTBA Joint Committee, chaired by Robert Hunter, of Missouri.

The results in this report are presented in the format of the survey questionnaire. The specific comments offered by member departments are grouped by AASHTO Region, and are presented without state identification. An effort has been made to faithfully copy member department narrative responses as contained on the returned survey questionnaires, both as to substance and format, and the numerical averages stated have been calculated from the information provided on the returned questionnaires.

The four AASHTO Regions are comprised as follows:

**Region I**

Maine
New Hampshire
Vermont
Connecticut
Massachusetts
Rhode Island
New York
New Jersey
Pennsylvania
Maryland
Delaware
Dist. of Columbia
Puerto Rico

**Region II**

West Virginia
Virginia
Tennessee
North Carolina
South Carolina
Georgia
Alabama
Mississippi
Florida
Arkansas
Kentucky
Louisiana

**Region III**

Nebraska
Minnesota
Wisconsin
Michigan
Iowa
Illinois
Indiana
Ohio
Missouri
Oklahoma
Kansas

**Region IV**

Montana
Wyoming
Colorado
New Mexico
Texas
Arizona
Idaho
Oregon
Washington
Nevada
California
Alaska
Hawaii
North Dakota
South Dakota
Utah

AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS
444 North Capitol St., N.W., Suite 225
Washington, D.C. 20001

## SURVEY ON IMPACTS OF TEN PERCENT MINORITY BUSINESS REQUIREMENT OF 1982 SURFACE TRANSPORTATION ASSISTANCE ACT (STAA)

49 Member Departments Responding
July 19, 1985

This survey is being conducted on behalf of the AASHTO representation to the AASHTO-AGC-ARTBA Joint Committee, and is parallel to an earlier Associated General Contractor's survey.

DIRECTIONS: -- Please respond to the following questions, based upon your state's experience and your knowledge of the highway construction market and contracting community in your state.

* * *

## I. AVAILABILITY AND QUALIFICATIONS OF MINORITY FIRMS

A. When the 1982 STAA was enacted, were there sufficient numbers of qualified (i.e., possessing expertise and capabilities required to perform highway construction work) minority construction firms in your state to satisfy a 10 percent minority business participation requirement in your state's Federal-aid highway construction program?

YES 21 NO 28

B. If the answer to "A" is "No", what level of minority business participation (other than 10 percent) more accurately reflected the availability of qualified minority construction firms in your state at that time, interested in performing on Federal-aid highway construction contracts?

5 % National Average (27 States Responding)

10.1 % Region I Average

4.1 % Region II Average

3.9 % Region III Average

3.8 % Region IV Average

C. Have you found qualified minority firms which are not interested in performing work on Federal-aid highway construction projects?

YES 32 NO 17

(How many?) 15 National Average (49 States Responding)

21.8 Region I Average

15.9 Region II Average

15.3 Region III Average

4.6 Region IV Average

D. If your answer to "C" is "Yes", what reasons are given by the minority firm(s) for not wanting to work on such projects? (Please relate actual experiences.)

Region I:

(Our State) minority-owned construction firms have participated actively in our federal-aid program. Our program is not attracting firms from the urban markets of other states where there is a broader base of minority-owned firms. The reasons given to us by these firms for their reluctance to come to (our state) include: 1. low value contracts in (our state) compared to large urban contracts, 2. excess mobilization costs to come to (our state), 3. already working to capacity in urban areas.

1. too much documentation as compared to their work in private sector, 2. as subcontractors they have to wait too long for payment, 3. do not want to use union furnished help, would like to do own hiring, 4. do not want to become a "front", 5. cannot afford to work as subs at contractor prices (prime)

not wanting to travel 500-800 miles for a small job, being booked to capacity.

out of state firms - 1. minority firm only bids as prime, will not quote subwork. not prequalified in (our state) and does not want to be, 2. Not economical to travel to (our state) for work. Enough work in home area. (Our state) subcontracts very small. 3. Can't compete due to union wage rates which don't apply in (our state).

These contractors complain about: prime contractors tactics which endanger their business, not being paid promptly, most are non-union, and will not become unionized, union general contractors will not hire some non-union subs.

Geographic locations of contracts too far from base of operations, too busy with other work, union requirements, bureaucratic red tape, bonding problems.

Delays in payment - cash flow bonding requirements, prevailing wage requirements.

enforcement of specifications, paperwork requirements, payment schedule - retainage.

Region II:

1. large volume of paperwork required, 2. not interested in expanding beyond private work, 3. lack of working capital, 4. no desire to be mobile, 5. unfamiliarity with regulations.

Private work is readily available and more lucrative. Paperwork requirements associated with Federally funded contracts. Most firms experience was in building related construction and they felt more comfortable in that type of work. More travel away from home base of operations associated with highway work. Lack of trust in highway program involvement due to not being involved historically.

The primary reasons given for non-interest in highway work is that business is more lucrative in the private sector and that payment on such projects is too slow. This appears to be particularly the case while performing as subcontractors.

Paperwork is too voluminous and complex. Department of Energy and Army Corps of Engineers and private enterprise have less stringent specifications and are, therefore, more attractive opportunities. Other agencies allow brokering of contracts so an otherwise qualified firm will bid as prime and turn subcontract 100% of the work at 95% their bid making a 5% profit without utilizing their work crews or equipment.

1. Too much bookkeeping and records, 2. They prefer to do business under the SBA's 8(a) program.

1. Don't want to work for state, regulations; paperwork; state inspectors are not fair; pay wages too high, 2. bonding, 3. what's the advantage to be a DBE (same game different name), 4. location of projects.
normally operate at capacity on other construction.

there have been several cases of DBE firms being contacted by our Supportive Service for possible certification who refused to apply because of the paperwork involved with state projects as well as the rigid specifications of construction operations. There was also a DBE firm who was certified and had done work on two state projects. When he was reviewed for re-certification he requested his name be removed from the certified list for the reasons mentioned above. He felt he could do commercial work with less problems.

1. Delay in progress payments by prime contractors, 2. Bonding and prequalification requirements of the State prevent DBE participation as primes, 3. Prefer to perform private work, rather than government work.

Region III:

Those reasons were: lack of sufficient knowledge and capability in highway area; high cost of doing highway projects due to white sheet rate requirements; already involved in other government projects with other agencies.

All of the firms are content doing their present level of work. Not interested in the increased paper work and red tape which in their opinion is necessary to work for government, whether it be Federal and/or State. Also, felt getting certified as a DBE was too much work.

1. certification process is administratively too extensive, 2. state agency pays slower than the private sector, 3. sufficient work available from local government agencies, 4. specifications too restrictive, 5. prime contractors create impediments that impose inordinate subcontractor requirements, 6. too competitive.

red tape, excessive paperwork and slow pay involved with government work.

Most were qualified DBE's per se, however, they did not possess highway construction capabilities and have not developed these capabilities. Several indicated that they were not interested in dealing with the requirements of Federal Aid projects.

Region IV:

Licensing requirements, specifications, plans, bonding and related paperwork requirements.

The only DBE Small Business Administration 8(a) certified firm in the state in 1982 for a long time indicated they planned to stay with 8(a) contracts for as long as possible. Another firm stated that they were no longer going to bid highway work because as SBA 8(a) certified they did not have to work with Prime Contractors.

the only time qualified firms don't bid is if they are too busy.

1. Prime Contractors "shop" bids, therefore not profitable to be subcontractor, 2. Bonding requirement, 3. Primes withhold payments to subs for a long period of time, 4. Inspection and specification not equally administered to primes and subs.

DBE has been financially prequalified prior to 1982, in his opinion has served his apprenticeship as subcontractor; only desire is to bid as prime.

Busy working in the 8a program. More profitable to negotiate a contract rather than having to participate in the competitive bidding process.

Firm stated they had enough business without getting involved in Federal Aid projects.

Lots of work on the reservation (which is where the majority of the firms are located) Also when working on the reservation many contracts are negotiated not bid on the open market, there are fewer controls, less taxes to be paid, etc. Many firms only want to work in their own locale instead of going statewide. The size subcontracts we let are too big for their company, etc.

Approximately 1/3 of the certified DBE firms listed in our directory perform the bulk of the DBE work. We have not attempted to ascertain the specific reasons why the remaining firms are not involved. Conversations with a limited number of DBE firms would lead us to believe that financing and bonding requirements are significant obstacles.

E. The STAA and Section 105(f) have now been in effect for close to two years. What has happened to the availability of minority businesses qualified to work on Federal-aid projects in your state during that period?

Check one.

37 - Availability has increased.

(How Much? - 2-800 %)

150 % Region I Average

30.5 % Region II Average

110.5 % Region III Average

60.2 % Region IV Average

0 - Availability has decreased. (How Much? - _____%)

12 - Availability has remained about the same.

F. In establishing minority business goals on individual construction projects, do you take into consideration such factors as subcontracting possibilities, current availability of minority firms, the capabilities of those firms, etc.?

YES 47 NO 2

Examples: (Please relate actual experiences.)

Region I:

Individual contract goals are set by evaluating the contract items compared to the availability of known qualified DBEs, the geographic location of the project and project size. In some cases we have had reduced goals for as low as 2-3% where we knew availability and the other factors of consideration would not possibly permit any greater DBE participation.

Even though in (our state) about 90% of the highway construction firms are MBEs or DBE's, if a Federal-Aid project is awarded to a non-minority firm, the same must submit evidence that not less than 10% of the contract will be performed by a DBE firm.

We base goals on our directory of D/WBEs type work they do and area of state they will work.

1. We analyze items generally sub-contracted vs. minority firms known to perform those items, 2. some firms always considered due to small number that actually quote, 3. we assume that those firms will perform as indicated. Currently performance monitoring very limited, 4. We have ignored the capacity of those firms utilized which will end up being detrimental to the program. Some firms over-committed and will either fail or become non-viable firms in an effort to meet commitments.

lack of subcontracting possibilities, location - 20% impact area, lack of available MBE.

Our goals are generally based on location, type of construction, proximity to urban areas which have larger numbers of disadvantaged or women owned businesses, availability of those firms and value of projects. Certain projects which are materials intensive are closely scrutinized to ensure that high goals do not result only from the cost of the materials.

Each project is reviewed prior to advertising to determine its capability to support a minimum percent of set aside for DBE and WBE participation.

Yes, we consider these factors but the burden of meeting the 10% goal is still the deciding factor.

Region II:

DOT Committee considers these factors in establishing individual contract goals also keeping in mind that mandated 10% participation must be achieved. Goals on individual projects will vary from 0-15%. High risk projects usually carry 0% goals.

We set or goals at 10% DBE straight across the board.

To the extent possible, consideration is given to the potential or lack of potential for DBE participation based on project location, DBE availability, and type work to be performed. However, due to the gauge goals forced upon the Department, in reality, little consideration can be given to anything other than numbers.

We determine the number of currently certified DBE/WBEs within a 75 mile radius of the project who have appropriate capabilities in relation to specific work items on the estimate. This provides the subcontracting potential for that particular project; however, the goals actually established are generally considerably lower than this percentage figure.

The DBE Contract Performance Goal varies depending on the types of work for which there is DBE capability on geographical convenience for capable DBEs. This State has recently instituted a set aside Program for DBE's, setting up small, specialized jobs appropriate to DBE capabilities.

Projects offering many subcontract opportunity goals are established 10% and greater such as large grade and drain, interstates and safety projects located in metropolitan area. Bridge projects goals are reduced because of quantities involved and the unavailability of qualified DBEs to perform bridge work. Pavement markers and logo signing goals are waived completely from DBE requirements.

The Department takes into consideration only whether or not a project will support subcontracting. If the project will support subcontracting a dollar goal is assigned equal to 10% of the engineer's estimate of the total job cost.

(our state) established a review committee to set individual project goals. The committee meets once a month to review plans for projects to be let to contract. The items of work included in each set of plans are studied for contracting opportunities suited to DBE firms in the general are of the project to be let. The goals are then set accordingly from 0 to 15%.

Region III:

We make every effort to establish realistic goals on each project. To accomplish this we must consider all of those factors. We place much emphasis on the efforts made by the contractor to reach the assigned goals as we do achieving the goals. Therefore, a contractor who makes reasonable and sufficient efforts to achieve a project goal but fails may have the goal reduced.

(Our Department) only places subcontracting goals in a very large project after consulting the specs. Most projects for DBE/WBE set asides as the whole project.

1. Project is analyzed and breakdown of those items that could be subcontracted are identified, 2. size and location of project - no goals on small projects and higher goals in urban areas where more minority contractors are available, 3. specific examples - bridge deck rehabilitation projects - 5% and Structural Steel projects - 2%.

The district engineer, assisted by other personnel and the District EEO Officer, review each project and determine the availability of qualified minority subcontractors, who can meet the assigned district goal. They are permitted to modify the assigned district goal for that project based upon their determination.

An ongoing work load analysis is performed on the minority firms, which is necessary for establishing project goals and/or determining project set asides.

Initially those factors above were not necessarily taken into consideration. However, in the revision of the program, those factors plus others, i.e., type of work to be performed and geographical location, were also considered.

(Our Department) EEO Contract Management Office receives a complete break out of work on all individual projects, which include the estimated dollar amounts for each work area, i.e., Excavation, trucking, etc. These computerized breakouts are provided by the (Department) office of design services, which receives all final plans. Location of the project is also a major consideration. After reviewing the project breakout and location the EEO Office then reviews the list of certified DBE firms which have an opportunity to participate on the project in terms of individual work specialties and mobilization capabilities.

A county PCC paving project, DBE goal would be small because usually a job of this type can have only three items -- PCC paving, shouldering and samples. Shouldering would be the only item on the job a contractor could use to meet his goal since the price for samples will not amount to very many dollars and naturally the contractors wants to do the paving.

We do not look at current availability nor do we make any commitment as to capabilities of the minority firms.

Region IV:

goals on individual projects range from 0 to 15%. Small (under $1 mil) projects in remote areas generally have low goals. Projects in (one city) carry goals of 12 1/2 to 15% unless they are overlay projects, then the goal would be lower.

On project in or near metropolitan areas, higher goals can be set because of the availability of D/WBEs. Also on new construction projects, higher goals can be set simply because the subcontracting possibilities are greater.

1. Availability of certified DB/WBE firms, 2. Work items identified for subcontracting, 3. Factors relating to industry practice.

The Department establishes MBE goals for projects by: 1. identifying subcontracting possibilities based on previous MBE subcontracting, and 2. current availability and capabilities of at least 2 MBE firms within the geographic location of the identified project.

1. the type of work required by the projects, 2. the subcontracting opportunities in the project, 3. estimated total dollar amount of the project, 4. the number, capacity, and capabilities of DBEs/WBEs.

All engineer's estimates are reviewed in advance of the bid letting for subcontracting opportunities-project work. The certified directory is reviewed for minority-owned firms with the capabilities to perform subcontracting work within the project.

Establishment of project MBE goals is based on availability of certified DBE/WBE firms by type of work, and the dollar amount of subcontracting opportunities available.

As best we can, we try to match project goals to the MBEs capabilities. However, there is no requirement in our state to pre-qualify subcontractors. Therefore, it is largely a guessing game. We have also set goals on some contracts when we knew the availability might not be there. This was done for two reasons, so that all types of contracts would have goals set on them and also to encourage the prime contractors to take innovative steps to find MBE subcontractors.

Each project is evaluated for geographical location, subcontracting possibilities, availability of D/WBE firms.

1. removed D/WBE goals on projects involving less than $50,000 in Federal-aid funds, 2. review the number of D/WBE firms available. 3. review the possibilities of overextension of D/WBE firms available, 4. review the type of work available for subcontract, 5. review the geographical location of the project involved in relation to D/WBE firms, 6. review the possibility of D/WBE firms of expanding into new areas of construction.

In establishing DBE/WBE goals, (our department) evaluates the type of project, geographic location, subcontracting and supplier opportunities, availability of DBE/WBE firms, firm's capabilities, amounts of materials to be manufactured outside the state and history of DBE/WBE participation.

Individual projects with curb and gutter, sidewalk, fending, landscaping, seeding fitting the capabilities of minority businesses are earmarked for participation. Availability of firms is taken into consideration as well as their size capabilities.

Goals are based upon speciality of DB Contractors, plan quantities and number of firms available. Also the annual goal status affects the goals placed on individual project goals.

1. Asphaltic concrete overlay project in western (part of state): Asphalt (AC); Aggregate; Barricades, Signs and Traffic Handling; Mobilization. Goal would be very low and based on haul of Aggregate and BS&TH, 2. Balanced rehabilitation project in (urban area): Dirtwork, Flexible Base; Concrete Pavement; Small Structures; Erosion Control; Barricades, Signs and Traffic Handling. Goal would probably exceed 10% because of haul, small structures, reinforcing steel tying in concrete pavement, erosion control, BS&TH, etc.

Goals are set based upon types of projects and geographical location.

## II. COST IMPACT OF SECTION 105(f)

A. Do you believe Section 105(f) has increased costs of Federal-aid highway projects?

YES 33 NO 10 (5 States N/A)

### Specific Comments Nationally

data not available
no hard evidence
unknown
don't know
not appreciably

B. If your answer to "A" is "Yes", what do you believe the cost impact of Section 105(f) to be?

5 % National Average

5.5 % Region I Average

4 % Region II Average

7.4 % Region III Average

3.5 % Region IV Average

C. If your answer to "A" is "Yes", why do you believe Section 105(f) has increased costs on Federal-aid highway projects? (When possible relate actual experiences.)

Region I:

D/WBEs may be subcontracted even though their price is a little higher than non-DBE/WBEs. Also, contractors' administrative costs are passed onto state in higher bid.

Most W/DBE still are not capable of bidding competitively in the "open market" as either prime or sub-contractors.

(our state) has a penalty clause. 1. Contractors must anticipate possible cost of penalty. 2. Minority contractors quote higher prices knowing they have to be utilized for project goal and award. 3. many hours of labor utilized in searching for minority commitments. Labor costs must be collected through higher bid prices.

Because of problems associated with utilizing inexperienced DBEs/WBEs, timeliness of completing work, meeting specifications, lack of quality work, availability of qualified DBEs/WBEs.

Additional costs of MBE solicitations, using MBE quotes in order to meet goals even though non-MBE quotes lower, MBEs unable to perform proposed work.

Limited number of MBEs to quote as subcontractors, mandatory provisions.

Increase due solely to section 105(f) is overstated by construction community.

Region II:

Do not have full competition as you would normally have in an open market situation.

Prime contractors sometime having to utilize quotes other than the lowest quote. Financing cost to prime contractors associated with assisting MBE firms and helping finance material and equipment needs. Administrative paperwork burdens associated with the program. Risks of delays associated with performance problems of firms.

1. overhead costs (record keeping, etc.), 2. correcting shoddy work, 3. picking up defaults on sub-work.

Location costs, increased administrative overhead, inability to pass bonding costs on to subs, increase in both on and off-site assistance required, supplemental supervisory requirements, etc.

Often DB's are unable to perform as agreed and work is delayed in trying to obtain a replacement. Contractors bid potential DB subcontract items higher in anticipation of higher DB sub bids. In one instance a DB bid 5 times the generally accepted rate believing that the prime had no alternative to meeting the contract goal.

Prime Contractors convey that DBE quotes are usually considerably higher than from non-DBEs; the DBE's inability to perform in timely manner; DBE's inability to provide surety and difficulty on becoming licensed with the Contractor's Licensing Board.

Prime having to accept quotes that are higher in order to meet his requirements. Also, the Prime is having to sublet work he normally would do himself.

Region III:

(Our state) has monitored bids of both set asides under Section 105 and non set asides. DBEs/WBEs are just as competitive as non minority contractors.

Limited competition among MBE firms. Primes sometimes will use a higher MBE quote to meet goal requirements.

1. restricts competition, 2. requires more supervision and coordination,
3. difficulties in obtaining quotation from minorities,
4. delayed scheduling and finishing of work, 5. minority bidding higher than other subcontractors.

The prime contractor must use the quotes submitted by DBE subs. The DBE firms not having the experience or established contacts of the established majority subs, are faced with higher costs and quotes than a majority subcontractor.

Additional administrative costs for prime contractors in soliciting DBE participation.

Not all of the cost impact has a direct effect on Federal and Highway projects. Much of the cost of the program is in the administration and monitoring which is not charged directly to the job. I have seen no proof that bid prices are increased due to the program. Cost increases have been related to a DBE getting too much work resulting in not being able to perform or is poor performance.

Most prime contractors get quotes from non-minority contractors lower than DBE's because DBE's are not yet competitive. Prime contractors are hesitant to take on new contractors due to lack of confidence in new firms not yet tested -- therefore a higher margin to do business for their own protection. Many prime contractors would not sub-contract any items if they were not required to do so to meet the DBE goals.

It is very difficult to justify relating cost increases to any one particular item. However, based on conversations with general contractors it is our opinion that the program has increased costs.

Region IV:

projects are coming in under the engineers estimate despite contractors assertions that using DBE's increases costs. We do expect contractors to use DBE's who give reasonable bids, (rather than the low bid) if that is the only way a goal can be met.

In the few instances where a prime contractor did not meet the goal, and submitted a good faith effort, the prices of the D/WBE subs were approximately 204% higher than non-DBE/WBEs. This is true only with specialty contractors such as guardrail and fencing. In other areas of subcontracting, the greater number of subs have made the bidding more competitive and has not resulted in increased costs.

This increased cost only applies to (department) Set Asides projects for both State and Federal collars. About 8% of (department) work is set aside and this work appears to cost about 10% more than other work. This .8% figure is based on FY84 projected Set Aside expense divided by total construction contract awards. The Department is not aware of any additional costs to Federal Aid projects on projects with MBE goals as the Department requires goals be met or the contractor must demonstrate good faith efforts to meet goals.

Solicitation of DBE/WBEs require extra cost (e.g. newspaper advertisements seeking DBE/WBEs; administration of program; time involved to adhere to DBE requirements (for contractors).

1. Any training program involves lower productivity. 2. When work is subcontracted, a second overhead is involved. 3. Compliance assurance takes resources. 4. Supportive services contracts at approx. $100,000/yr.

Mandatory acceptance of DBE quotes provided. The quotes are reasonable - not necessarily lowest. The lack of purchasing power is reflected in sub-quotes. Underfinanced and inexperienced DBEs result in reduced production and higher costs.

The same number of D/WBEs are competing for substantially more work, thus there is less "competitive" bidding for D/WBE subcontract work.

Common sense says that it will cost us more on projects with mandatory goals. MBE subcontractors get work on the projects but are routinely "too high" on projects that have good faith efforts.

Minority business subcontract quotations run 5% to 10% higher than non-minority quotations. Depending on the project and the minority firms, slower performance by the minority firms because of size and experience have increased overhead costs of prime contractors for an estimated overall increase of 3-5%.

We have no figures to support increased costs of Federal Aid highway projects. Administrative costs of the program not directly charged against the contract may be considerable.

We have no evidence which would lead us to believe that there have been any significant cost increases.

It is a definite increase in administrative costs to advertise, solicit by phone and personal contact to obtain DBE/WBEs to perform subcontracting. The cost of monthly reports are a part of this cost. It is alleged by contractors that cost of work done by DBes is in excess of what it would cost them to do it, but our subcontract prices that we see do not necessarily support the latter.

## III. ALLOWANCE FOR BEST EFFORTS V. USE OF STRICT QUOTA REQUIREMENTS

A. On their face, do your highway department's specifications allow for the award of contracts to bidders who have failed to meet the contract's minority business goals, but have made best efforts to do so?

YES 44 NO 5

B. If the answer to "A" is "Yes", in practice, must bidders actually meet or exceed contract goals before they will be awarded the contract?

YES 10 NO 33 (6 States N/A)

Examples: (Please relate actual experiences.)

Region I:

We evaluate good-faith efforts, and award even if goals not met, if contractor makes good-faith effort.

None, because although permitted by specs, we have always insisted on meeting or exceeding goals.

We have had no cases to date where a bidder was unable to meet a specific contract goal before award. We have had low bidder's who, although they were unable to meet the goal at the time of bid submittal, were convinced by the (Department) to commit more dollars to DBEs before award, but every low bidder has the option to demonstrate an unsuccessful good faith effort to attain a specific contract DBE goal.

Contractors may fail to meet goals if they are able to present satisfactory documentation of the efforts as prescribed in the contract.

waivers can be granted if efforts are well documented and legitimate. Documented responses to request for quotes. Documented price comparisons when minority quotes too high. Documented proof of unreasonable or unattainable project goal requirements.

"peak season", D/WBE saturation

BEST COPY AVAILABLE

Region II:

Specifications do provide for submission of good faith effort in lieu of achieving the minimum level of participation. Contracting industry has elected not to submit these types of efforts due to fear of sanction if DOT does not accept, i.e., disqualification from bidding for up to 12 months as well as loss of project award.

(Our State) has a clause in its special provisions which establishes a panel hearing process to determine the adequacy of "good faith efforts" in the award process.

Bidders not meeting or exceeding contract goals may be awarded a contract if the proposer/bidder can demonstrate that reasonable and sufficient efforts were exerted to meet requirements. The Department has awarded contracts where the bidder did not meet the total percentage goal but showed that maximum efforts were made to accomplish objectives.

To date most of our contractors have exceeded the goals, because we have passed onto them the fact that we have been told by FHWA regional that they cannot approve a request to waiver our 10% goals.

On a paving project that had a designated goal of 15%, the prime contractor subcontracted out every time that could be subcontracted to a DBE that equaled only 6.13%. This project was awarded due to the complexity of the project as explained to the "good-faith Effort Committee" concerning the quality of workmanship that was needed on this project.

FHWA here feels very strongly that if any bidder met contractor goal that all bidders could have also met it. It is also this State Agency's concern that acceptance of documentation of efforts would ultimately result in degenerated results such as to cause serious problems meeting the annual goal.

Region III:

no, based on good faith effort. No examples.

Any time a DBE goal is not met, prime contractors are required to submit a (Department) Good Faith Efforts Certificate so that contractors efforts to meet DBE goals can be accurately measured.

Usually DBE goals are waived or reduced on county projects, because the PS&E's are not always available for review before assigning a goal. (Our Department) attempts to take a realistic approach to meeting its DBE goal and at the same time treat all parties involved fairly.

When a mandated subcontract is placed in a project, the prime contractor has the opportunity to prove to the Department their good faith efforts tried and failed to meet their goal.

Contracts may be awarded if affirmative effort is evidenced by documentation.

We have awarded a few projects with reduced participation on the basis of "good faith effort". (8 or 10)

There has been limited cases where the prime contractor has been unable to attain the goals established. Each case is evaluated on its own merit and waivers are given in limited situations.

We will recognize good faith effort with proper documentation, however, such instances are rare. For the most part goals are met.

The prime contractor is required to submit a signed minority utilization plan that indicates whether they will meet the goal or request a waiver/modification. If the latter, they are required to submit their documented Good Faith Efforts. Included in this plan is a minority participation statement that identifies the minority, the work to be performed, and the dollar amount. This is signed by the minority and the prime contractor.

Region IV:

Bids on approximately six projects have been rejected since the passage of STAA of 1982 requirements. This was done because of failure to show a satisfactory minority business enterprise participation commitment.

Our benchmark for measuring good faith effort is prior prime contractor accomplishment in terms of meeting goals. As long as the industry continues to demonstrate that the goal level is capable of being reached that will remain our standard for good faith effort.

This Department has not experienced this situation as of the date, but it could occur at any time in the future. It if occurs, it will be fairly judged on the face of the efforts made prior to and after the bidding date.

If the low bidder does not commit to the assigned contract goals, the contract Special Provisions (copy attached) provide for an intensive review of the good faith efforts made by the low bidder to subcontract to certified minority firms prior to the bid opening. (procedure attached)

Only 2 contracts have been let out to bid because of "good faith efforts" below the goal.

The Department's Commission policy states: ". . . the successful bidder shall be selected on the basis of having submitted the lowest bid which has met DBE goals. Should the low and otherwise responsive bidder fail to meet the contract goal, responsiveness shall be determined on the basis of good faith efforts taken to attain the contract goal. Good faith efforts shall be determined by comparing the percentage of DBE participation of the low bidder with the average of the percentage of DBE participation submitted by all bidders on this project . . ."

To date, all awards have been to contractors meeting contract goals. On two projects, the lowest bidders were not awarded the contracts because of their failure to meet the contract goals and failure to provide sufficient evidence of good faith efforts.

a contract will be awarded based on "good faith effort" if the contractor has contacted all the firms listed in our directory as performing work in the location of the project. During FY 84 four contracts were awarded based on GFE.

In the instance where none of the prime contractors were able to meet the goal our State would probably determine that the first apparent low bidder made a good faith effort and would be awarded the job.

If a contractor does not meet the required MBE goals, they must submit their good faith efforts to attain these goals. A 3-member committee reviews the contractor's efforts. The committee makes recommendations to the MBE liaison officer as to whether the contractor met the requirements or did not. The MBE liaison officer then decides to either award or not award.

Contractor submits a summary which indicates % DBE and %WBE he intends to subcontract. If he fails to meet specified goal, he must show a definite "Good Faith Effort" has been made before a contract will be awarded.

C. Does your state reject a bid on a project which does not contain an unequivocal commitment on the bidder's part to meet or exceed the minority business goals established for that project?

YES 17 NO 31

Specific Comments Nationally

we award the contract before a plan is submitted, but the work order isn't issued until a plan is submitted (see attached Special Provision)

not automatically

Yes, if good faith efforts are not demonstrated.

No, if good faith effort documentation is approved.

Not if the bidder shows he contacted DBEs

Must look at good faith effort.

(our state) has not had to reject

D. Is your state using set asides to supplement its minority business subcontracting requirements?

YES 14 NO 34

E. If your answer to "D" is "No", do you anticipate your state using set asides in the future?

YES 7 NO 26

## IV. IMPACT OF SECTION 105(f) ON NON-MINORITY FIRMS

A. In attempting to meet minority business goals on Federal-aid highway projects, have your prime contractors had to subcontract work to minority businesses even though non-minority firms have quoted lower prices for the work?

YES 23 NO 5 DON'T KNOW 21

Examples: (Please relate actual experiences, including any known examples of actual cost increases incurred through use of minority firms not providing the lowest price quotations.)

Region I:

To our knowledge, such an experience has not occurred in (our state).

We have had instances where bidders have told us the job would cost more if they used a certain DBE, but this was in a subcontracting area where no non-minority firms are working.

No actual examples only widespread contractor comment to that effect.

While we don't keep records of such occurrences, prime contractors tell us this does happen. We don't dispute such claims.
Based on testimony of prime contractors.

Minority quoted on curb items at higher than non-minority and was committed to the project. Due to inexperience of minority, (our state) would not accept and the bidder found another minority firm to meet the goal with other items. If minority firm had been acceptable, the non-minority firm would have suffered extreme financial loss.

We have sought to develop an operational definition to "Reasonable Bid" while keeping constant with "price alone shall not be the sole determinant". Cases have developed wherein D/WBE prices have been substantially below unit bid prices, but more than that bid by another prospective subcontractor. Since the general contractor had been rigid about the items which were available they were left with an option to expose other items or pay a higher but comparatively reasonable price. On each occasion of this occurrence the contractor has complained about having been forced to pay a premium price to D/WBE. We have no record of a general contractor paying more than the unit bid price.

Region II:

The Department does not require that sub-bids from all sources be shown. Therefore, we cannot say that primes have or have not been forced to use the higher quotes of minority businesses. We have been told, however, that some of the primes accepted such quotes. Some primes provide an analysis of quotes received to illustrate why requirements could not be met.

numerous occasions

General contact with individual contractors and AGC organization indicates this is routine occurrence. A 10% increase is the most frequently heard figure.

Prime contractors have often complained of higher quotes from certified firms though no records have been kept concerning this.

this has occurred on numerous occasions with specialty items.

Many prime contractors have advised that subcontracting to DBes costs substantially more than to non-DBEs. This has been borne out by eliminating the DBE goal from a project and readvertising the job with no plan changes. Bids received for the job with no DBE goal were lower than those received previously.

Several prime contractors have complained that non-minorities offered much lower quotes particularly on our large bridge contracts.

Region III:

based primarily on information furnished with good faith efforts and experiences related to us by contractors.

In keeping with the spirit of 105(f), we do not expect a prime to use a minority firm's quote if it is more than 5% higher than the quote of a non-minority firm. We are aware of a few primes who have used the higher MBE quote versus the lower one of a non-MBE.

Documents have been presented by prime contractors showing both majority and minority quotes on the same items of work. In all cases the majorities quotes were lower than the minority quotes.

Although some prime contractors have stated instances where a DBE subcontract was higher, I have not seen documentation of an award to a DBE which quoted a higher price. Some primes have stated they always use the low bid.

There have been occasions when the DBE subcontractor may not be the lowest bidder to the prime, but close enough to be considered reasonable by the prime.

In reviewing the quotes from DBE firms vs. non-minority, the non-minority firms are usually lower due to the lack of experience of DBE firms. Example: The DBE quote was $24,780 for seeding, fertilizing and mulching 29.6 acres and the prime contractor could have done the job for $16,280. The DBE was 52% higher.

Do not have any actual examples of work going to higher costing minority firms. In conversations with individual prime contractors have been advised that to actually meet the goals, they have had to use higher quotes.

Region IV:

Assume that on the mandatory goal projects MBE must be used when other non-minority subs are lower.

The Department does not receive all quotes provided to Prime Contractors by both D/WBE and non D/WBE contractors. The Department has no way of monitoring subcontractor bid prices.

As indicated in part II minority business quotations have run approximately 5-10% higher but have been used because of minority goal requirements.

It is not compulsory for contractor to meet specified goal if he makes an acceptable "Good Faith Effort". However, some contractors have indicated they have used DBE firms who were not lowest quote rather than put forth extensive effort on "Good Faith Effort".

In all instances, when a prime contractor has the capabilities to perform the work and subcontracts portions to DBE's in order to meet contract goals. The prime contractor experiences overhead costs as well as the DBE subcontractors; in addition, both will adjust the bid prices to reflect a certain percentage of profit.

The Department has no evidence that this has occurred. However there may be contractors that do this. It is not a requirement of the Department.

there is no specific information available. Contractors have indicated that they have accepted bids from DBE's that are up to 10% higher. (Our state) pays a bonus for exceeding goals and this may impact decisions.

Our State does not require that this information be made available to us. However, prime contractors and non/DBE firms have related to us that this was indeed the case.

B. Have your prime contractors had contracts where minority subcontractors have been unwilling or unable to perform?

YES 43 NO 0 DON'T KNOW 6

Examples: (Please relate actual experiences.)

Region I:

Subs for drainage installation had no work force or supervision; sub for sidewalk construction had no trucks or forms or equipment.

Lack of equipment and trained manpower, too much work on books of competent firms, lack of up-front money.

We have had several out-of-state minority firms who did not meet our guidelines for commercially useful function and were cited for their deficiencies. All (state-based) minority-owned firms have performed satisfactorily.

Minority firm (out of state) further sub-contracted to non-minority due to heavy workload in his home area. Would not send any personnel to supervise or control his commitment. Did not pay the non-minority personnel or have anything to do with the project. Prime contractor made a good faith effort to replace the minority but could not. Waiver of that portion of the goal was granted.

Some subcontractors have defaulted and some others have overextended themselves and have not been able to perform all the work for which they contracted.

At present, we have not encountered such a problem or situation.

1. payment dispute for work done (or not done), 2. W/MBE found costs exceeding his bid prices, 3. difference in opinion on interpretation of contract.

The frequency of this situation has dropped since (our state) dropped its overall goal from 10% in FY84 to 6% in FY85.

There are some general contractors on whose projects D/WBE will not bid. The DF/WBE claim that the general contractors business practices are so ruthless that they prefer not to engage in business with them. Other general contractors are "slow payers" and some others make oral change orders and later dispute the authenticity of having requested the added work or having agreed upon a fair price for the effort.

MBEs unable to perform due to excess workload, inadequate work force, improper equipment. MBEs unwilling to enter into subcontract agreements with prime contractors.

MBE overextended, close monitoring of field operation discourages minimally qualified MBEs .

Region II:

There have been DBE firms that have been unable to perform because of low working capital. In most cases, they are unable to sustain themselves until estimates are paid minus retainage.

Our DBE/WBE special provision has a clause allowing such substitution and it has been used on numerous contracts.

There have been situations when prime contractors had contracts where minority subcontractors have been unwilling or unable to perform. Most of the situations appear to revolve around a lack of sufficient planning and coordination of work. Often times, the minority firm may be committed to several projects that are active at the same time. Also, most of these firms are small and consequently have difficulty leveraging necessary (financial) resources.

27 defaults by MBE firms has occurred during current FY. Reasons generally tend to be associated with overextension of actual capability, lack of adequate equipment, unanticipated site conditions, increasing cost to perform work, and overextension financially. Many problems associated with MBE firm's inability to accurately estimate cost of performing work and their lack of general business skills.

This has occurred several times when DBEs have gotten better offers closer to their home offices or have received offers with more profit.

1. Unwilling to perform -- based on added requirements, failure to follow up on verbal agreements; disputes regarding payments for services rendered. 2. Unable to perform -- due to conflicts in schedules; not enough time prior to issuance of a notice to DBE to start work. 3. Don't know.

In the past 18 months, two instances have occurred. One DBE contractor was not able to pay his employees weekly, failed to pay unemployment taxes and income taxes, subsequently he went out of business. There was a dispute between the prime and subcontractor as to the scheduling of the work to be performed by the respective parties. As a result, the project went into liquidated damages and there has been no resolution of how the damages will be shared between the parties. Therefore, when initial differences surfaced between the same parties on another project, the prime declared the subcontractor in default and requested to use another DBE.

Minorities have in at least 2 instances failed to report to the job when they determined that they had under bid. Several minorities have failed to report to the job site because of scheduling conflicts. Several minorities have been placed in default because of inability to perform work they had previously stated they could perform.

A few have failed because of cash-flow problems, etc. One now being sought in two counties on bad-check charges.

(our department) procedure for DBE substitution require the prime contractor to notify the Office Engineer, in writing, of the reasons for a change in DBE firms. The reasons given for DBE substitution have ranged from the DBE firm being unable to perform because of overextension, or lack of equipment to the prime's inability, after numerous notifications, to get the DBE firm to appear on the project.

Region III:

During FY 1984 this figure was approximately $311,000.

At any given time any subcontractor regardless of race will refuse or cannot perform for various reasons.

Time scheduling become a problem

1. Bankruptcy, 2. Modified/accelerated production schedules, 3. Current cash flow problems, 4. Slow payment by the prime after being paid by the agency, 5. previous experience with primes unethical business practices, 6. major equipment failure.

Most cases have been because the minority sub took too much work from several prime contractors and could not possibly do all the work they had been identified to do.

There are a few cases but in most instances the DBE performed. Where this does not occur, the prime either provides assistance or the department, through paid consultants or the prime, is given approval to discharge the DBE.

There have been instances of DBE subcontractors experiencing difficulty with performance, however the (department) EEO Contract Management Unit has become involved and the problems appeared to clear up.

This has normally been due to the DBE having too much work to be able to perform all contract commitments.

During FY84 our records indicate that 25 DBEs failed to meet their subcontractual obligations with prime contractors.

Region IV:

Mostly due to poor scheduling or the MBEs overextending themselves. We've also had several instances where the minority subs were not particularly qualified to do the work and went bankrupt during the course of the project.

We have had isolated instances where DBE sub-contractors could not perform the total amount anticipated because they had overestimated their ability to perform either the type or quantity of work and also, DBE sub-contractors got into financial difficulty which effectively limited their ability to purchase supplies, hire personnel, etc.

A DBE subcontracted to provide labor and materials (prime supplied the equipment); the DBEs progress was slow, some work did not meet specifications and he failed to pay his bills; he abandoned the job.

We have had two specific instances where a landscaping contractor and a fencing contractor was unable to do the work contracted.

Unable to perform because of overextension in their contractual obligations.

Defaulting - overscheduling by DBE firm, out-of-business, material supplied by the subcontractor was not certified.

Several different DBE subcontractors have quoted items of work that they were unable to perform due to lack of experience, equipment, finances and licensing. Quotations on guardrail installation - no license or equipment. Quotations on cold-milling - no license, no equipment, no experience.

1. D/WBE received subcontract and refused to perform work because the type of work to be performed was out of D/WBEs realm of capability. 2. D/WBE received subcontract and requested that they be relieved of responsibility because they were overextended. In both cases the Prime was granted a change in subcontract items. However, the Prime Contractor was required to substitute an equal amount of DBE participation before approval of substitution was granted.

Because of default or bankruptcy by MBE firms have a few MBEs being unable to perform. Also other MBEs have taken on work and reached a limit to their resources.

We don't know of any specific instance; however, contractors complain they have to sometimes help DBE subcontractors perform work to keep up to schedule and/or provide an acceptable quality of work.

During FY83, 84 and to date in FY85, there have been some 583 subcontracts approved by the Department. Of the 583 subcontracts, there were 20 subcontract failures by 5 MBE subcontractors.

In one case, a DBE subcontractor felt that the prime contractor had changed the conditions of the bid and refused to perform the work. In most cases, the DBE firm has too much work and is unable to perform on a particular project.

C. Do you know of specialty subcontractors who are being, or have been forced out of business because their discipline is one in which minority firms are largely being used to meet contract minority business goals?

YES 12 NO 36

Examples: (Please relate actual experiences.)

Region I:

Most non-minority sub-contractors are complaining that the program has severely reduced their workload. One curb contractor would have been severely hurt, but the prime found another minority to do other phases of the project.

The contractor associates claim that they have suffered membership loses. However, we know of no particular company which went out of business because of their specialties becoming a D/WBE item of work.

Most (state) based firms have entered subcontracting areas where there are no non-minority firms. For those DBEs in the general construction field the increased federal-funding via STAA 1982 has generated sufficient contracting opportunities for all firms in (our state) - minority and non-minority.

Not completely out of business but some certainly have suffered loss of contracts as a result of the requirement. Guardrail installers, electrical contractors, flasher barricade companies.

Region II:

We have had numerous contacts from small majority specialty contractors who say they are being forced out of business since prime contractors must now give the work they used to get to minority firms to meet contract goals. Some are forming 51-49 relationships with minority partners in order to try to survive.

Most all of our erosion control and traffic control and striping contractors have either ceased operations or converted their companies to DBE or WBE status.

There is at least one specialty contractor that is no longer in business. Others have experienced less work available to them.

We have been told by several that this is happening.

We have had no direct experience with a specialty sub being forced out of business. In several instances, the non-minority specialty sub has formed DB firms which were no more than fronts. On goal projects the DB bid and on non-goal projects the non-minority firm bid.

Region III:

Some majority guardrail and seeding contractors fall into this category.

This does not happen in (our state) because we set aside total projects performed by the whole highway construction industry.

We have heard these complaints but no valid documentation has been submitted.

Specialty subcontractors were adversely affected by DBE goals, however, I am not aware of any firm which has been forced out of business as a result.

There are no specific instances that we have knowledge of.

No, however a number of specialty contractors' workloads have been lighter than previous years due to the STAA of 1982.

Many small non-minority subcontractors have disappeared from industry. We do no keep list of non-minority subs to give actual names and numbers, but in routine association with the industry realize those firms are no longer around.

Region IV:

Non minority specialty subcontractor's share of the market has diminished. We are not aware of any that have actually gone out of business as a result of the program.

For the most part, DBEs are used on specialized areas of work traditionally subcontracted out by the primes - guardrail, fence, electrical, traffic control.

Guardrail and pavement marking firms

A number of small fencing contractors, landscaping contractors and concrete contractors have been seriously hurt by refusal of prime contractors to accept or consider the bids of their firms because of MBE/WBE goals on Federal-aid projects.

In a recent guardrail project advertised and awarded by the State, the non-DBE subcontractor expressed concern over the difficulty in competing with two other DBE firms for guardrail work.

Fencing, Guardrail, traffic control and some other miscellaneous work has undoubtedly reduced the volume of work done by some non-minority specialty subcontractors. We do not know of any specified firm that has gone out of business.

A few businesses have reported some decrease in work. We have no indication that firms have been forced out of business.

The Department is not aware of any specific companies who have been put out of business. However, the Department is aware that some specialty firms have indicated that their businesses have suffered because of the MBE goals program.

T.6 - AASHTO Policy Statement on MBE (July 15, 1983)

The action of Congress in enacting Sec. 105(f) of the Surface Transportation Assistance Act of 1982, setting as a requirement that not less than 10% of the amounts authorized to be appropriated under the Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by Sec. 8(d) of the Small Business Act except to the extent that the Secretary of Transportation determines otherwise, is acknowledged.

The member departments of AASHTO have been and remain committed to increasing the participation of socially and economically disadvantaged individuals in programs of their departments. The requirement of Sec. 105(f) is accepted as both a challenge and a minimum goal, in the spirit it was enacted by the Congress. The member departments of AASHTO commit themselves to taking every reasonable action within their command to meet this challenge and goal by the earliest possible date, including engaging in efforts to locate, develop and encourage socially and economically disadvantaged individuals and their business enterprises, and extending assistance so that they can achieve satisfactory levels of participation. In meeting this commitment, every effort will also be made to treat all persons with fairness and equity.

While recognizing and pledging a commitment toward meeting the provisions of Sec. 105(f), the member departments recognize that not all states will be capable of achieving the stated level of participation, at least not in the immediate future. This will be true despite the best good faith effort on the part of those departments, because of shortages of business enterprises operated by socially and economically disadvantaged individuals both within the state's borders and within reasonable geographic proximity thereto, institutional and legal barriers that will take time to alleviate or remove, and similar factors. Accordingly, it is the position of AASHTO that where a state fails to achieve its participation goal in any given year due to these factors, despite a true and complete best faith effort, the Secretary of Transportation should utilize the discretion provided under Sec. 105(f) and not financially penalize that state for its failure to achieve the goal. Further, should a state choose to seek a waiver, AASHTO urges that prompt and favorable consideration be accorded thereto where it is evident that a good faith effort to meet the statutory goal is being made.

It is further the position of AASHTO that the Federal Highway Administration should provide all reasonable assistance to the member departments in support of their efforts to achieve set participation goals, including providing necessary supporting services to aid in minority business development activities. Finally, it is also the position of AASHTO that the U.S. Department of Transportation and its modal agencies should adopt regulations for administrating Sec. 105(f) that are in keeping with Congressional intent, and which clearly acknowledge that states will not be financially penalized when they fail to achieve an established goal after making a truly best effort attempt to do so.

Approved by the Policy
Committee on October 13, 1985
in Seattle, Washington

POLICY RESOLUTION

PR10-85 - Establishing a Task Force on the DBE Program

AASHTO recognizes the value of encouraging greater participation of "Disadvantaged Business Enterprises" (DBE's) desiring to become part of the transportation industry.

AASHTO believes that Section 105(f) of the 1982 Surface Transportation Assistance Act (STAA) was enacted with the intention of providing a practical and beneficial program for achieving this goal.

However, the years of experience with this program indicate significant problems as documented by a recent survey conducted by the American Association of State Highway and Transportation Officials. These include:

- Determining how to get more small, disadvantaged businesses involved in contracting work.
- Increasing the number of minority employees working for DBE's.
- Clearly defining ownership requirements for DBE's.
- Evaluting the impact of the program on the established sub-contracting community.
- Providing meaningful training programs and technical assistance.
- Defining "good faith efforts".
- Evaluating the process of applying DBE program goals to areas consistent with the availability of minority contractors.
- Determining ways to minimize project delays and additional costs that are being experienced.

The President of AASHTO is requested to appoint a Task Force on the DBE Program, balanced among the AASHTO regions, and charged with evaluating each of the stated problems and reporting back to the Policy Committee at its February, 1986 meeting with findings and recommendations.

## AASHTO TASK FORCE ON DISADVANTAGED BUSINESS ENTERPRISES

| | |
|---|---|
| Chairman | Thomas Drawdy, Florida |
| Region I | Franklin White, New York<br>Susan Crampton, Vermont |
| Region II | Ray Bass, Alabama<br>John Tabb, Mississippi |
| Region III | John Kemp, Kansas<br>Lowell Jackson, Wisconsin |
| Region IV | Richard Knapp, Alaska<br>Fred Miller, Oregon |

AMERICAN ASSOCIATION OF STATE HIGHWAY
AND TRANSPORTATION OFFICIALS

THOMAS D. LARSON, President
Secretary
Pennsylvania Department
of Transportation

FRANCIS B. FRANCOIS
Executive Director

## RESPONSE SUMMARY

## OF

## UPDATE SURVEY OF STATE ACTIONS FOR IMPLEMENTING SEC. 105(f) OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

May 1, 1984

Prepared by the AASHTO Task Force on Sec. 105(f)
Harold C. King, Chairman

Based on returns received from 46 states to questionnaire distributed on March 13, 1984. The questionnaire questions are underlined in the report, and no identification of specific states is made.

EXECUTIVE OFFICE: 444 N. Capitol Street, N.W. [illegible]

## COMPILATION OF QUESTIONNAIRE RESPONSES

## AASHTO UPDATE SURVEY OF STATE ACTIONS FOR IMPLEMENTING SECTION 105(f) OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

1. What methods or approaches are now being used by your state to increase Disadvantaged Business Enterprise (DBE) participation? Please check the appropriate items below, indicate the relative effectiveness of the approaches, and elaborate where necessary.

a) Setting of challenging contract goals

- Yes - 39
  - 31 Very Effective
  - 6 Somewhat Effective
  - 1 No Elaboration
  - 1 Not Effective
- No - 5
  - 2 Not voting

Comments -

Yes, somewhat effective - Project by project goals - items, location capabilities of active DBEs.

Yes, somewhat effective - The setting of challenging contract goals has been effective in the past, but we are reaching a level of DBE saturation and are considering other approaches, including set-asides.

b) Incentive or reward programs

- Yes - 5
  - 2 Very Effective
  - 2 Somewhat Effective
  - 1 No Elaboration
- No - 35
  - 2 Somewhat Effective
  - 32 No Elaboration
  - 1 Not Effective

  - 6 Not voting

Comments -

No answer - Implementation pending legislative action.

Yes, very - Bonus clause - 15% of excess of required percentage up to 2% of contract dollars.

No answer - Panel review for good faith effort and all feasible means test - 15%; reimbursement for expenses involved in utilizing DBEs.

c) Penalty clauses

Yes - 13
10 Very Effective
2 Somewhat Effective
1 No Elaboration
No - 27
6 Not voting

Comments - No answer - Removal of contractor from bidders' list for 90 days for failure to achieve required participation.
No answer - Implementation pending legislative action.

Yes, very - Penalty of less than required percentage.

No - No actual penalty clause, except low bid is deemed not responsible if it doesn't meet goals and can't prove good faith efforts.

d) Set-asides

Yes - 7
4 Very Effective
1 Somewhat Effective
2 No Elaboration
No - 35
1 Somewhat Effective

4 Not voting

Comments -

Yes - Implementation began March 1984; unable to evaluate at this time.

No - No competition available.

No - The Department is exploring the legality of set-asides in the state.

e) Rigid review of good faith efforts documentation

Yes - 37
33 Very Effective
4 Somewhat Effective

No - 9

Comments -

Yes, very - "Good faith effort" is only acceptable to Department at the point the contractor desires to replace the designated DB/WBE found unable to perform. Written commitment to fulfill contract goal, naming DB/WBEs to be used, subcontract items and their prices are required as a condition to award of the contract.

Yes, very - Total documentation of effort and verification of said effort

f) Supportive services programs

Yes - 44
20 Very Effective
23 Somewhat Effective
1 No Elaboration
No - 2

Comments -

Yes, very - We have one technical and one management consulting firm servicing 95% of the state, with the balance being served by the engineering and business schools of a state university.

Yes, very - Supportive Service contractors, upon receipt of notice of advertisement for bids on Department projects, systematically provide DBEs with the project type and bid items that might be of interest to them. Further, each DBE is matched with the respective type of specialized work available. Interested DBEs responding are then assisted in the submission of quotes to each contractor bidding the project.

Yes, somewhat - SSC actively seeking to give technical advice to DBEs.

g) Unique DBE contract provisions - please elaborate

Yes - 22
17 Very Effective
2 Somewhat Effective
3 No Elaboration
No - 20
1 Very Effective

4 Not voting

Yes, very - Prime contractors must submit DBE subcontractor bid information at time of bid opening.

Yes, very - Contract provisions spell out what must be accomplished by the prime to meet the goals set. The provisions are an integral part of the contract award.

No - Incentives would be more effective if raised in value, but the Department has limited incentives in case they are not considered by contractors as a prebid condition and used to gain a bidding advantage. If bids are lowered, then cost is not increased. If not, then incentive would add to cost. Department is still evaluating actual practice to determine cost impacts.

Yes - DBE subcontractors are named in the bid proposal at the time bids are submitted by primes.

Yes, somewhat - Contract not awarded if good faith effort not satisfactory.

No - Department believes in setting realistic contract goals. However, we do require good faith efforts documentation, to the point that if the second bidder has met the goals, it is a strong presumption that all contractors could have met such goals.

Yes, very - An executed agreement between prime and subcontractor is required stating type of work, unit price, signed and notarized by both parties, submitted for approval prior to award of contract.

Yes, very - "Good faith effort" is only acceptable to agency at the point the contractor desires to replace the designated DB/WBE found unable to perform. Written commitment to fulfill contract goal, naming of DB/WBEs to be used, subcontract items and their prices are required as a condition to award of the contract.

Yes - Training Incentive Program well received but too new to report on its operation.

Yes, very - Provisions are mandatory as used on selected projects. Sanctions for noncompliance are included in Contract Special Provision.

Yes, very - Department has created four DBE/WBE participation options that allow for geographic location and availability of subcontractors. The "Good Faith" option enables the apparent low bidder to attest to a lower dollar amount and allows the prime to substantiate his efforts to achieve the required goal.

Yes, very - We have set aside special contracts through our Right of Way Division for DBE contractors in the range of $2,000-$50,000, mostly in demolition.

Yes, very - Question bonus clause as to creation of overextension of present DBEs or creation of improper business enterprises.

No - The Department has an internal supportive services program which works exclusively with the DB/WBE program required by DOT. The program is run by state employees as opposed to consultants. It has worked well in our state and has allowed the agency to stay in compliance and excel in the intent of the DB/WBE concept by promoting and encouraging greater DB/WBE involvement in the highway industry.

This Department uses the special provision and contract language depicted in the Business Assistance Program.

Our provisions and monitoring procedures of the DB/WBE program have resulted in a positive situation where goals placed on construction contracts are being met or exceeded in almost all cases.

In addition, the agency has tried to implement a set-aside procedure for awarding contracts but because of litigation the agency has been restricted from using set-aside as a positive means to increase DB/WBE participation. It is hoped that a mutual agreement with contractors can later be reached so that a set-aside program may be used in the futur

Yes, very - Our utilization form is being revised to reflect STAA terminology.

No - We are exploring the facility of targeting certain items of work in a contract for D/WBE participation. This targeting would be predicated upon our knowledge of the availability and capacity of D/WBE at the time of the contract award.

Yes, very - While our state does not have a set-aside program (not legal), we have set goals from 20%-70% which are absolute. Proposals received must reach assigned goal or they will not be read.

Yes, somewhat - DBE provisions are included in highway contract documents. Design contracts contain a clause requiring compliance with 49 CFR Part 23.

Yes - Schedule O; eligibility form for truck owner-operators, and contract special provision allowing credit to prime contractor for his use.

Yes, very - Special provision that provides for liquidated damages for failure to satisfy DBE goals.

Yes, very - This agency assigned specific DBE goals to selected projects to assure that overall annual goals for DBE participation are achieved. Good faith effort solicitation for DBE subcontractors is a requirement in all federal-aid contracts.

Yes, very - Good faith efforts have been defined to require prime bidders to meet the goal established or meet the average of all bidders and their DBE utilization.

No - The penalty clause we use refers to that from Section 105(f) that indicates if the goal is not achieved by the contractor on a particular project and good faith efforts are also not used, then the contractor will not be awarded the contract.

Yes - DBE goals are established at different rates on an individual projects basis. Goals range from 1% to 10%.

Yes, very - The Department has four different contract provisions that are used. This allows us to be very specific in dealing with contractors, consultants.

h) Other - please elaborate

Yes, very - Annual state regional conferences of Transportation Department, FHWA, Supportive Service Group with DBE/MBE/WBE contracting community and others to promote DBE/WBE program.

No answer - Outreach efforts by supportive service groups in locating nontraditional DBE highway contractors and the maintenance of an on-going relationship and dialogue with other state, federal and municipal agencies which have DBE/MBE/WBE programs are additional methods utilized by this Department.

Yes, somewhat - Prime contractors have been encouraged to assist the DOT in the development of DBE firms. However, this type of arrangement has to be monitored to assure that the intents of the federal regulations are met.

Yes - When the bidder submits his bid, he must also furnish the DBE name, what they will do, and the dollar value of their work. The DBE cannot be changed after the letting except with the concurrence of the DBE; (example: more work than they can do, company went under, etc.).

No answer - Also included in this unique DBE/WBE special provision--the prime cannot hold retainage from the DBE/WBE subcontractor, must pay the DBE/WBE within seven working days after the prime has been paid.

No answer - Require as a bid condition the identification of DBEs/WBEs at bid opening. Conduct prebid conferences to familiarize prime contractors and DBEs as to the requirements of 49 CFR Part 23 and the DBE program.

No answer - A supportive services consultant is employed to provide one-on-one assistance to selected minority firms in the areas of accounting, business management, estimating, bidding techniques, and plan reading. We also have a voluntary internship program whereby a minority is paired with a majority firm in order to receive management.

Yes, very - Appeals Review Hearing.

Yes, somewhat - Public notices published in newspapers; preparation of an informative brochure containing information on DBEs; contact with the General Contractor Association and consultants, conferences with representatives of the municipalities, in-house information program.

No answer - Proper management of the DBE program on a daily basis.

Yes, too early to measure - We have started a mentor-protege program which would expand the capacity of DBE firms on highway-related contracts.

2. (a) Does your state now use additional material or a replacement for Schedules A and B of 49 CFR, Part 23 for certification?

Yes - 38
No - 8

Comments -

Yes - We request additional information other than the Schedule A.

No - On-site visits where feasible.

(b) If yes, please attach a sample of your state's current certification form(s).

Comments -

Applicant must provide the following: articles of incorporation, by-laws, minutes of last board of directors' meeting or stockholders' meeting, proof of ethnic heritage, statement of bonding capability and capacity, statement of types of work performed, complete breakdown of ownership, including spouse's ownership.

Schedule A is used; however, considerable supportive documentation testimony and a site visit are used in conjunction with Schedule A.

Certifications have been centralized at a new state agency on MB/WBEs.

(c) Does your state now have any formalized verification procedures which are used to check the information that is supplied by DBEs in order to obtain certification?

Yes - 40
No - 6

Comments -

No - No formal procedures. However, on-site visitations are made to verify information on applicant's original submittal.

No - Certification procedures for verifying information have not been finalized through written procedures but are conducted in a formal manner. We are in the process of formalizing verification procedures and through supportive services funds have hired a "field" person to fill this need.

Yes - DBE audit; we use the DBE eligibility standards in the federal regulations as a basis for conducting audits.

Yes - On-site review conducted on all in-state firms; review out-of-state firms within 100-mile radius of our state's border, if questionable.

Yes - These have not been reduced to writing; however, in short, claims are audited by on-site visits, testimony, and by auditing material sent from other certifying agencies when they exist.

Yes - Calls, on-site audits.

Yes - Through additional information requested, and actual on-site visits of the firm's office when necessary.

Yes - Total verification when certified by others. Verification of current status with that agency. Back-up data for certification.

Yes - On-site review and discussion with applicant.

Yes - Office of Inspector General.

Yes - Post-certification on-site reviews.

No - Although no formalized verification procedures exist, selected on-site reviews are conducted.

3. (a) Has your state instituted procedures to certify as DBEs, on a case-by-case basis, firms owned by individuals who are not members of one of the groups presumed to be socially and economically disadvantaged?

Yes - 23
No - 23

Comments -

No - No requests made to date by firms which would fall in this category. Procedures, however, will be developed.

Yes - Presently being developed.

No - We have the capability of handling any such applications, but nonehave appeared. No special procedures are required of our current system.

Yes - With the support of the office of the SBA and in accordance with Appendix C, "Guide for Making Determination of Social and Economic Disadvantage."

No - No applications to date.

No - Other than SBA 8(a) certified.

No - We evaluate what is presented based on common sense.

Yes - The use of a consultant to verify the members seeking certification as DBEs on a case-by-case basis.

(b) If yes, how many firms has your state certified under these procedures?

Even though 23 states said yes, 17 have certified no firms; 4 have certified one firm apiece (one of those is pending); 1 has certified three firms; and 1 has certified sixty-six firms.

Comments -

Three firms-- two previous women business enterprises and one disadvantaged veteran.

None have applied.

None to date--procedure began February 1, 1984.

4. How many contractors who perform work for your state were accepted as DBEs because they held a certificate by the Small Business Administration (SBA) as an 8(a) firm?

Anonymously by State/No. of firms/Stated as % of Total Certified DBEs

0 / --
5 / 3.6
18 /10
information not recorded
0 / --
6 / 7
0 / --
5 / 2
7 / 1
6 /10
0 / --
0 / --
0 / --
0 / --
0 / --
0 / --
2 / 8
0 / --
1 /<0.01
0 / --
1 / 0.115
0 / --
9 / 8
4 /10
2 / 0.01
0 / --
7 / 2
5 / 4 (5/119)
[ in state 4 / 6 ]
[out of state 3 / 1.1]
3 / 7
* 3 / 9
20 / 2
0 / --
8 / 6
2 / 2
2 / 1
very few /<2
0 / --
0 / --
all /100
9 / 8.6
2 / 1.1
1 / 2
6 / 4.8
15 / 4.7

* State presently has 16 with 8(a) certification. Most of these were certified 8(a) after initial MBE certification under 49 CFR 23. Three firms applied with prior 8(a) certification; percentage is 9% using total of 16 firms.

One state gave no figures but noted that the firms considered as MBEs will be reevaluated and be classified if they qualify as DBEs.

5. If your state awards contracts when the contract goals are not met, what procedures are used to verify good faith efforts?

Basic procedures as described in 49 CFR Part 23.45, Appendix A 18
No answer 16 Other 8 Appendix A and Other 4

Comments -

No answer - Good faith efforts are not acceptable under our contract provisions.

Other - Basic procedures as described in 49 CFR, Part 23.45, amended.

No answer - We do not award jobs when goals are not met.

Appendix A and Other - Contracts made with prime and potential DBEs who were not contacted by prime as indicated in good faith effort summaries and documentation.

Appendix A - Contract special provision.

Other - The referenced regulation was used as a guideline; however, additional steps to determine good faith efforts were also added and are considered relatively effective.

Appendix A and Other - A meeting is arranged with the FHWA, Contracts Engineer, EEO Supervisor and the prime contractor to analyze good faith efforts put forth by the contractor to meet the goal. If other bidders on the project meet the goal, then the low bidder is expected to meet it.

Other - Department evaluates the good faith efforts on a case-by-case basis; however, if other bidders met the goal, there is a strong presumption that all contractors could have met the goal. The areas of good faith that we would be looking for are included in our specifications.

Appendix A and Other - Compare contractors' efforts to Appendix A and outlines developed by good faith committee.

No answer - As previously discussed, full commitment to fulfillment of goal is an element of responsiveness of the apparent low bidder prior to award of contract.

Other - Department uses a preaward compliance review system. Good faith effort is measured by close audit of contractor's efforts, with corroboration of claims sought from the named DBEs. Sufficiency is measured by comparing nature/level of effort in relation to contract potential and universe of availability of goods/services from DBEs in reasonable geographic area.

No answer - Not applicable - mandatory provision has been complied with.

No answer - None have been awarded on good faith efforts.

No answer - State does not utilize good faith effort in its award procedures.

No answer - We have not awarded a contract to a contractor who did not meet the goal.

Appendix A - Total documentation of good faith effort. Waivers seldom granted.

Other - Contract provisions and Department DBE Program. Note: This program has been submitted to FHWA; however, we have not as of this writing received their concurrence.

Other - Special Provision.

Appendix A - Documentation required.

Other - We have review panel chaired by Deputy Secretary for Administration. Includes Deputy Secretary for Highway Administration and Special Assistant for Minority Affairs.

Other - A conditional award is made but the contract is not offered to the contractor for signature until a satisfactory commitment to meet the goal has been made.

No answer - Special Provision Bid Conditions Minority Business Enterprise Part (D) Bidding Requirements.

No answer - Good faith effort solicitation must be provided as a condition of award of contract. Following award, compliance reviews are conducted as a monitoring tool.

No answer - Meet the goal or the average attainment of all other bidders.

Appendix A - We look very closely at the individual efforts considering both the intensity and timeliness of the efforts. We will also look at the contractor's history of meeting or not meeting goals on DOT contracts to establish a measurable track record.

Appendix A and Other - Review by Commissioner-appointed panel - contract may be awarded but contractor not relieved of participation requirement - must meet "all feasible means" test at completion of project if participation not achieved.

6. Has your state instituted an appeal process which:

(a) enables a decertified DBE firm to appeal a decertification decision by the state?

Yes - 40
No - 6

Comments -

Yes - The appeal process is informal. We will meet with concerned businesses to fully explain our position and accept any additional information.

Yes - DBE appeal committee.

Yes - In accordance with 49 CFR Part 23.55 (Appeals & Denials of Certification).

Yes - Presently rewriting program to include same.

Yes - DBE Appeals Committee. Five members, chaired by Deputy Secretary for Administration.

Yes - Not "formal" appeal but opportunity to provide additional information prior to final decision - then appeal to Secretary, USDOT.

(b) deals with third party complaints other than those associated with an individual's social or economic disadvantage, e.g. disadvantaged owner's lack of management, ownership or control, suspected fraudulent statements in certification documents, etc.?

Yes - 35
No - 10
Not voting - 1

Comments -

Yes - When we receive a complaint, contact is made with the individuals. We assess the facts and then, if warranted, make an investigation.

No - Procedures are in early stages of development.

No answer - Receipt of formal complaints will result in an investigation even though a formal appeal process has not been developed.

No - Department has not had any third party complaints, to date.

Yes - In accordance with 49 CFR 23.69 (Challenge Procedure).

Yes - Presently rewriting program to include challenge procedures.

7. Have there been any significant court decisions or legal opinions relating to the DBE program in your state?

Yes - 7 (One did not elaborate)
No - 39

Comments -

No - Not since the passage of STAA of 1982.

Yes - A prime contractor failed to meet the established DBE goal and attempted to justify by good faith efforts. The state denied the prime the contract. This denial was upheld in court.

Yes - Black Contractors United vs. Governor ... .

No - We have held five adjudicatory hearings--three on certification status, two on compliance. Our stance in each instance was deemed appropriate.

Yes - Certification-Decertification Regulations were issued in the State Register.

Yes - AGC of ... vs. Secretary USDOT and Director DOT (case dismissed by stipulation); Max Riggs Const. Co., Inc. (Plaintiff) vs. State DOT, et al (Defendants) Motion of Summary Judgment in July 1982.

Yes - In December 1983 the Department began to implement a set-aside program and to advertise projects as set-aside; but before the letting date the Associated Contractors of ... filed a lawsuit and injunction on the program. The U. S. District Court granted the preliminary injunction and the lawsuit is still pending. Associated Contractors of ... vs. ... State Highway Commission, et al.

Yes - Wright Farms Construction, Inc. vs. ... . This case held that the use of quotas (MBE set-asides) is constitutional only to the extent that it is remedial. Further, the court found that there was no evidence of any discrimination against minorities in the state and that imposition of minority quotas was unconstitutional.

9. Of your total DBE participation (dollar value) for FY 1983, what percentage was for DBE prime contracts, and what percentage was for DBE subcontracts?

Anonymously by State/% DBE prime contracts/% DBE subcontracts

1.75 / 98.25
0 / 12
10 / 90
Information not separated on data base
3.7 / 7.1*
0 /100
0 /100
1.7 / 98.3
60 / 40
0 /100
7.8 / 92.2
9 / 91
0 /100
0.7 / 8.6 (approximate)
0 / 9.68
13.8 / 86.2
0 /100
2.1 / 6.9**
24 / 76 (total DBE participation - $6,068,004)
12 / 88
0.8 / 8.2
33.9 / 66.1
63 / 27
50 / 50 (total $3.8 M; prime DBE $1.7 M)
2.05 / 4.22
0 / 9.6
2 / 15
14.2 / 85.8***
10 / 90
48.3 / 51.7
32 / 68
Almost entire 8.45% was subcontracts
No less than 10%
0 /100
0 /100
0 /100
1 / 99
<1 / 7.9
0.79 / 99.21
37 / 63
1 / 99
0 /100
0 /100
0 / 4.5 (federal-aid projects, approximate)
1.86 / 98.14
0.54 / 9 MBE & WBE****

* Data for FY 84 to date. Not available for FY83, but comparable to FY84
** Changed "DBE" to "MBE" and added "% of MBE Consultants - 0.3"
*** Federal-aid projects only for FY82-83; $1,208,260 and $7,272,653, respectively.
**** Figures are what state's screening committee assigned as minimum requirements.

). Would you be willing to share your DBE program experience at a coming joint AASHTO/FHWA DBE Conference?

Yes - 46

Comments -

Yes, depending on funding and agenda.

Yes, but would want to listen and learn from others' experience.

.. Please provide any additional comments or suggestions you would like to regarding the operation of a successful DBE program in your state.

More highway supportive services monies are needed for bonding and venture capital for DBE contractors.

Need improved training and technical assistance to DBE after award by proven contractor personnel. We have bonding, loan and estimating assistance to help DBEs obtain contracts by offering adequate support during construction.

Cooperation of prime contractors and general awareness of MBE/DBE program.

Monthly update of certification list, strong supportive service groups, firm commitment from state DOT chief official, assertive leadership by DBE liaison officer, cooperation among state DOT officials, minority contractors and non-minority contractors, and adequate documentation have been the major components of our program success.

A ten-week construction management course for DBEs and WBEs only was recently completed. The course originated from a recommendation from ... Constructors, Inc. during a Governor's Task Force meeting concerning minority businesses. The courses were given by the ... Laborers' Training Trust Fund and was funded by supportive services funds. Initial response from the 29 individuals completing the course was very positive. Apparently, this is the first time this type of training has been offered to DBEs and WBEs. We anticipate this program to be very successful.

Person responsible for the daily administration of the DBE program must be aware of business practices of prime contractors and must be capable of making instant decisions that treat all parties affected fairly. This individual must be able to interpret the federal regulations and explain them to affected individuals in a manner that is understandable and acceptable.

I feel a great deal of our success must be given to top management. They have been supportive and have upheld the firmness of our program. Without this type of support, the program would have little chance for success.

BEST COPY AVAILABLE

Tighter DB/WBE eligibility criteria, closer screening and monitoring of certification, together with substantially increased project goals are being felt at an ever-increasing rate. Principal among the situations we are now encountering are: (1) more numerous allegations of the inability of the designated DB/WBE subcontractor to perform (with and without substitution of another DB or WBE, as appropriate) and (2) an increase in complex, sometimes questionable working relationships between the prime and subcontractor. Both situations are seen as increasing the administrative and jobsite burden and the time required to act upon subcontracting matters. How the effectiveness of our program and procedures will be affected remains to be seen.

State DOT has established a strong certification system which includes due process and has established a strict compliance procedure which also includes due process. Now that this is well in place, we are expanding our program to include technical assistance and direct economic development of DBEs and WBEs. The largest weakness in this program is lack of venture capital for these small businesses.

Reciprocity must be addressed. Implementation of State Program 10% and 5% Goods and Services.

State DOT has executed a contract with a consulting firm to provide technical assistance in the form of "hands on" training through a series of seminars and one-to-one technical assistance. The consultant has also prepared a resource document titled "Highway Contracting Handbook."

Certified WBE firms should count on contract goals.

DBEs must be educated and familiarized as to the requirements of bidding on public works projects through workshops and followed up on a one-to-one basis with the firms showing interest. Knowledge of estimating, subcontracting and quoting to prime contractors is a must. The prime contractors must also be familiarized to the requirements of 49 CFR Part 23 and assisted whenever possible in order to avert non-responsiveness in their bids. Prebid conferences and workshops including prime and DBEs on a one-to-one basis are beneficial.

More direction toward review of good faith effort. Question the requirements for prime DBE's responsibility to meet subcontract goals - what's the proper % application to overall goals? Establish % of work by DBE with same prime contractor.

As chief administrator of this Department, I support and encourage the DB/WBE Program. I would like to see more states implement set-asides as well as discuss other techniques which would better the program and increase participation.

Due to the time constraints imposed by your due date, we are unable at this time to provide the requested comments or suggestions.

This Department does NOT encourage the protege-mentor relationship during the initial formation of the firm. The relationship is, however, strongly encouraged on a project-by-project basis after the firm has been certified. We feel that this greatly eliminates the hazards of "fronting."

There are some difficulties in certification of Native American Indians where geographical limits (reservations) are not maintained.

Contract Management Division of the Bureau of Construction and Materials and the Bureau of Equal Opportunity have developed priority list for processing DBE/WBE application.

As Hispanic, the identification of MBEs will apply to almost everyone. We will be classifying MBEs if they qualify as DBEs in order to comply with the 49 CFR Part 23, Subpart D, Section 105(f).

We would like to see a policy of national reciprocity adopted concerning the issue of DBE certification whereby certification by the W/DBE's host state would be accepted by all states. This would make the process of certification more acceptable to W/DBE applicants and be more cost effective. Currently supportive services funds are being wasted by states due to duplication in the certification process.

Need an FHPM on commercially useful function applicatics.

A successful DBE program means the involvement and a mutual cooperative effort between DOT, the majority contracting community and the disadvantaged business community. The DBE program must be open and available for comment and questions at all times. The sincere commitment by all DOT staff persons involved is essential.

We are experiencing a substantial increase in DBE participation. The real credit is due to the cooperation of the state's contractors who have provided equipment and technical assistance to DBE firms. This has enabled DBE firms to take significantly larger contracts than would otherwise have been possible.

There needs to be aggressive recruitment by both the agency and industry in order to enlarge the pool of eligible DBE firms.

Would like information on how other states are staffed to handle the DBE program. Do they utilize a computer system for monitoring, reporting, tracking, etc.

# ADDITIONAL TESTIMONY

SUBMITTED BY

SUSAN C. CRAMPTON, SECRETARY

VERMONT AGENCY OF TRANSPORTATION

ON NOVEMBER 19, 1985, TO THE

TRANSPORTATION SUBCOMMITTEE

U. S. SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

ROBERT T. STAFFORD, VERMONT, CHAIRMAN

JOHN H. CHAFEE, RHODE ISLAND
ALAN K. SIMPSON, WYOMING
JAMES ABDNOR, SOUTH DAKOTA
STEVE SYMMS, IDAHO
GORDON HUMPHREY, NEW HAMPSHIRE
PETE V. DOMENICI, NEW MEXICO
DAVE DURENBERGER, MINNESOTA

LLOYD BENTSEN, TEXAS
QUENTIN N. BURDICK, NORTH DAKOTA
GARY HART, COLORADO
DANIEL PATRICK MOYNIHAN, NEW YORK
GEORGE J. MITCHELL, MAINE
MAX BAUCUS, MONTANA
FRANK R. LAUTENBERG, NEW JERSEY

BAILEY GUARD, STAFF DIRECTOR
[illegible] MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510

November 6, 1985

RECEIVED

Ms. Susan Crampton
Secretary
Agency of Transportation
State Administration Building
Montpelier, Vermont 05602

Dear Ms. Crampton:

The Transportation Subcommittee of the Environment and Public Works Committee has scheduled a hearing to review the section 105(f) program included in the Surface Transportation Assistance Act of 1982. We would like to invite you or a representative of your organization to testify. The hearing will be held on Tuesday, November 19, 1985 at 10:00 a.m. in Room 406 of the Dirksen Senate Office Building.

Witnesses are asked to address the following questions in their testimony:

(1) What is the capacity for Disadvantaged Business Enterprises (DBEs) and Women Buiness Enterprises (WBEs) for highway construction work?

(2) Currently, how many DBEs and WBEs are bidding as prime contractors for highway construction work? How can more DBE and WBE firms be developed as prime contractors?

(3) What effect has the section 105(f) program had on non-minority specialty contractors and WBEs? If there have been adverse effects, how should they be addressed?

(4) What kind of certification process for DBE and WBE firms should be required? Should the process be uniform for all States?

(5) What kinds of training, financial or other technical assistance are needed by DBE and WBE firms? Should thic kind of assistance qualify towards the ten percent goal?

(6) What, if any, additional cost does the section 105(f) program add to the Federal-aid highway program?

Ms. Susan Crampton
November 6, 1985
Page Two

(7) What, if any, experience have you had with firms that do not appear to be legitimate firms? How can the fraudulent use of this program be prevented?

(8) How have States with small minority populations been able to meet the DBE requirements? What, if any, problems have they had in attracting out-of-State DBE firms?

Witnesses are asked to limit their oral testimony to a five-minute summary. Written statements will be included in the hearing record in their entirety.

In accordance with Committee policy, witnesses must supply 10 copies of their testimony 48 hours prior to the hearing day to the Senate Transportation Subcommittee, 410 Dirksen Senate Office Building (for mail deliveries), 415 Hart Senate Office Building (for hand deliveries), Washington, D. C. 20510. Witnesses are asked to provide 50 additional copies of testimony on the day of the hearing. If you have any further questions please call Jean Lauver (202-224-7863), Nadine Hamilton (202-224-5921), or Paulette Hansen (202-224-3597).

We look forward to having your testimony on this important issue.

Sincerely,

Steve Symms

Quentin N. Burdick
Ranking Minority Member
Subcommittee on Transportation

Steve Symms
Chairman
Subcommittee on Transportation

**(1) What is the capacity for Disadvantaged Business Enterprises (DBEs) and Women Business Enterprises (WBEs) for highway construction work?**

In Vermont, the capacity of W/DBEs is relative to the activity of a core group of Vermont-based firms as prime and subcontractors. These firms will continue to work, but will also reach their construction capacity from time to time. DBE participation levels in Vermont while the affirmative measures of 105(f) remain in effect are projected at between 8 and 10%. A major WBE prime contractor who has accounted for 80 - 90% of WBE participation since 1981 is no longer in the program; with the WBEs remaining, the projected capacity for WBE participation is 3 to 4%.

**(2) Currently, how many DBEs and WBEs are bidding as prime contractors for highway construction work? How can more DBE and WBE firms be developed as prime contractors?**

DBE Prime Bidders - 2 Construction Firms
4 Supportive Services Firms

WBE Prime Bidders - 5 Construction Firms
3 Supportive Services Firms

An effective means of developing W/DBE prime contractors is through continued technical assistance to existing W/DBE subcontractors. This assistance helps these small businesses develop the capability to bid as primes, as demonstrated by their overall financial stability as a company, bonding capacity, performance record and effectiveness as a competitive bidder.

Another indirect, but extremely important, avenue to the development of W/DBE primes is the On-the-Job construction training program for women and minorities. This program will eventually develop a viable pool of qualified individuals who may choose to become part of the construction industry as independent business people.

**(3) What effect has the section 105 (f) program had on non-minority specialty contractors and WBEs? If there have been adverse effects, how should they be addressed?**

In Vermont, very little. The size of the federal-aid construction program has increased two-fold due to the STAA 1982 funds; more dollars are available now for every contractor. If, at some point, the federal funding recedes to its former level an impact may be felt by some of Vermont's small and specialty subcontractors.

**(4) What kind of certification process for DBE and WBE firms should be required? Should the process be uniform for all States?**

Certification procedures should follow the format and information requirements detailed in the Schedule A, and 49 CFR 23. The base certification application should be the same for all states. FHWA Region I states have developed and are using a standard certification application. An on-site review of any applicant firm should be required to verify the existence and operation of the applicant as an active business, and the ownership and daily control of the woman/minority individual.

This Agency practices and strongly advocates the reciprocal acceptance by one public authority of the W/DBE certification of another public authority who utilizes a certification procedure that meets these requirements.

Efforts to standardize the certification procedures of all public authorities who administer a W/D/MBE program must be increased. No W/DBE should be faced with more than one certification review; this is a costly and exhausting procedure for the W/DBE and even though an army of government employees and consultants have made their livelihood conducting certification reviews, the fact remains the certification process, in and of itself, does not put dollars in a W/DBE's pocket.

**(5) What kinds of training, financial or other technical assistance are needed by DBE and WBE firms? Should this kind of assistance qualify towards the ten percent goal?**

Our experience in Vermont has been that most W/DBEs are capable and experienced in the particular facet of construction or service their firm performs. The weaknesses of these firms is in their management expertise (accounting, business planning, estimating, cash flow, work scheduling). In an effort to fill this business knowledge void the Agency has instituted these training and technical assistance methods:

a) Direct tuition assistance for Community College of Vermont (CCV) courses in small business management; CCV has been utilized because it has the educational mechanism in place. This program has a minimal cost to the Agency and can effectively train a number of W/DBE owners.

b) A portion of the Agency's W/DBE supportive services funds is allocated to a consultant to provide the W/DBEs with technical assistance (bidding and contract information, business planning assistance, loan packaging, bonding assistance, surveys of W/DBE needs, assistance in developing mentor relationships).

c) The consultant who performs the on-site review procedure for all Vermont W/DBE applicants is also charged with conducting a session with newly certified Vermont W/DBEs to introduce them to Agency bidding procedures, contracting and subcontracting policies, and the technical and financial assistance available through the Agency.

d) In addition to tuition assistance for CCV courses the Agency pays W/DBE owners' registration fees for educational seminars held by organizations like Associated General Contractors, and the University of Vermont.

e) A non-profit Native American tribal organization in Northwestern Vermont formed a corporation in 1984 with the primary objective of providing employment opportunity for the economically depressed Native American population of the area. The Agency extended grants to the organization to purchase a basic inventory of equipment and begin business as a traffic control subcontractor for interstate rehabilitation projects. The benefits of the action was two-fold - a new employment source for Native Americans was fostered, and an access to the Agency's paving projects that had not previously existed for DBE firms was created.

f) Merging of W/DBE supportive services and On-the-Job Training (employee training for women and minorties) efforts - beginning in F.F.Y. 1986 the Agency will establish trainee positions with established W/DBE subcontractor firms where credit (and a monetary training subsidy) could be claimed on a number of federal-aid projects. Up until this time the Employee Traineeship bid item was available only on large projects of long duration, with only the prime contractor as the recipient of the training funds. Two objectives can be achieved the W/DBEs will receive the benefit of training funds, and a trained work force of women and minorities capable of starting their own businesses in the future will continue to develop.

In answer to the second part of the question, it is the Agency's understanding that supportive services to W/DBE's contracted to a W/DBE consultant firm are creditable towards the fulfillment of overall goals by the Agency. This policy should continue.

**(6) What, if any, additional cost does the section 105 (f) program add to the Federal-aid highway program?**

A significant cost affect of 105 (f) is really not apparent with the data available since the program's inception in January, 1983. Short term projections indicate that the W/DBE program has had a cost benefit in some instances (increased competition in the guardrail industry) and caused higher costs in other areas (subcontracting of items to W/DBEs on paving projects that might otherwise be performed by the prime contractor).

**(7) What, if any, experience have you had with firms that do not appear to be legitimate firms? How can the fraudulent use of this program be prevented?**

Many active Vermont based W/DBE firms existed as viable companies prior to Section 105 (f). The growth and expansion of these firms has been faster than it might have been had 105 (f) not been enacted, but their success would most likely have occured without 105 (f).

The bulk of serious problems with the Agency's W/DBE program in construction has been with W/DBEs from other states who, for the limited value of contracts they are committed to in Vermont, are unable to mobilize their own forces and equipment from their home-state to do the work in accordance with Agency contracting and subcontracting policies, and to serve a commercially useful function on the project.

The Agency has taken a hard line against this deficiency. Our position has been, and continues to be, that a W/DBE from any state should have complete and convenient access to our construction program. If their participation is less than legitimate by our standards a written notice is issued stating that recurrence on another project of a similar lack of function will result in the participation percentage of the W/DBE being nullified and contract sanction procedures commenced. The participation of 13 DBEs in F.F.Y. 1984 included three out-of-state firms who no longer work in Vermont; the firms served a limited commercial function on the projects they worked on in 1984 and were notified as such.

**(8) How have States with small minority populations been able to meet the DBE requirements? What, if any, problems have they had in attracting out-of-State DBE firms?**

Vermont has been able to meet its W/DBE goals through the consistent participation of a core group of W/DBE prime contractors and subcontractors. The following is a detail of this participation:

F.F.Y. 1985 (Federal share only)

8 WBEs Participated as Subcontractors on 32 projects for $1,305,869 (4 Vermont firms, 1 N.Y. firm, 3 N.H. firms).

3 WBEs Participated as Primes on 8 projects for $7,435,324 (2 Vermont firms, 1 N.Y. firm).

Total: $8,741,193 Prime and Sub Awards to WBEs for 13.8%

8 DBEs Participated as Subcontractors on 30 projects for $2,448,561 (5 Vermont firms, 1 N.H. firm, 1 PA. firm).

3 DBEs Participated as Primes on 8 projects for $612,465 (2 Vermont firms, 1 N.Y. firm).

Total: $6,595,537 Prime awards and Subcontract Commitments for 10.4%

F.F.Y. 1984 (State and Federal monies on federally funded projects)

5 WBEs Participated as Subcontractors on 17 contracts for $187,830 (3 Vermont firms, 1 N.Y. firm, 1 N.H. firm).

2 WBEs Participated as Primes on 6 contracts for $7,380,026 (2 Vermont firms).

Total: $7,567,856 for 22.6%

10 DBEs Participated as Subcontractors on 14 contracts for $1,615,227 (6 Vermont firms, 1 PA. firm, 1 ME. firm, 1 R.I. firm, 1 CT. firm).

5 DBEs Participated as Primes on 9 contracts for $1,110,446 (3 Vermont firms, 2 M.A. firms).

Total: $2,725,673 for 8.1%

| | |
|---|---|
| F.F.Y. 1983 | |
| WBE | 4 Vermont Firms and 1 N.Y. firm participated for $3,417,163 or 8.5% |
| DBE | 3 Vermont firms participated for $3,017,163 or 8.5% |
| F.F.Y. 1982 | |
| WBE | 3 Vermont firms participated for $3,192,862 or 8.4% |
| DBE | 3 Vermont firms participated for $2,258,072 or 5.9% |
| F.F.Y. 1981 | |
| WBE | 4 Vermont firms participated for $1,480,624 or 2.6% |
| DBE | 3 Vermont firms and 1 M.A. firm participated for $4,047,472 or 7.1% |

Vermont's diffuculties in attracting W/DBEs from other states evolve mostly from the relatively small dollar value of the Agency's construction program (both for individual contracts and as an overall program) compared to neighboring states. The cost of mobilizing an operation from Massachusetts, Connecticut or New York, where minority populations are higher and DBE availibility is higher, can not be justified for a DBE when greater contract opportunities are available in the DBEs homestate.

By the same token, mobilization, or the difficulty in mobilizing, is a traditional and realistic limiting factor in the construction industry. Vermont-based W/DBEs do not normally travel beyond the Vermont and New Hampshire borders.

This leads to another important factor -- prime contractors enjoy doing business with subcontractors with whom they have developed comfortable relationships. Many Vermont DBEs have established an adequate track record; bidding contractors are beginning to deal with them in much the same manner traditionally afforded the "good ol'boy" subcontractors in the "brotherhood" system. This is a positive step for DBEs in an industry that depends on positive and dependable relationships between prime and subcontractors.

## 1980 Vermont Census Data

| | Asian & Pacific Islanders | Black American | White | Hispanic American | Native American |
|---|---|---|---|---|---|
| Population | 1,640 | 1,188 | 503,345 | 3,777 | 1,068 |
| % of Total | 0.32% | 0.23% | 98.41% | 0.66% | 0.22% |
| Median Family Income | $24,406 | $23,314 | $19,817 | $19,991 | $12,080 |
| **Education** | | | | | |
| % of H.S.Grad. | 78.8 | 83.7 | 71.0 | 73.2 | 50.0 |
| % of Col.Grad. | 48.5 | 31.1 | 18.9 | 21.6 | 14.0 |

## DBE ANNUAL REPORT

## HIGHLIGHTS FOR F.F.Y. 1985

### W/DBE PARTICIPATION

In F.F.Y. 1985 10.38% of all FHWA-funded Agency Contracts were awarded or committed to DBEs. 13.85% of all FHWA-funded contracts were awarded to WBEs.

The use of specific project goals has proved to be the most effective means of developing maximum DBE participation. By evaluating and analyzing each project individually, the Agency can determine what contract opportunities exist compared to the DBEs available to perform those specific portions of the contract. In some cases somewhat less than 10% of the contract can be reasonably identified as offering real potential for DBE participation, and an appropriate goal is assigned. In other instances DBE subcontract opportunities in excess of 10% are noted and a larger goal assigned. Examples of the latter case are the Rouses's Point Bridge project and the Stage II portion of the West Rutland-Rutland U.S. 4 project. Such projects with DBE goals larger than 10% help to offset decreased participation on projects with lower specific DBE goals and have resulted in an overall DBE participation level of 10% in 1985.

The Agency is further encouraged by the fact that despite the strong objections from contractor organizations pointing out the negative aspects of this program and goals assigned, no low bidder has yet failed to meet a contract specific DBE goal.

## SUPPORTIVE SERVICES

With the beginning of the Agency's fiscal year for supportive service contracts two new contracts were instituted.

Resource Development Group, Inc. was selected to conduct on-site certification reviews for Vermont-based firms applying for W/DBE certification. This task was previously included as part of the technical services contract which continues, in its new form, to be handled by JAYCO Enterprises, Inc. The Agency's certification procedures continue to be prompt and efficient; Resource Development Group, Inc. has completed all reviews and submitted a recommendation for certification (or denial) within 30 days of their initial contact with the applicant. Final approval by the Prequalification Committee usually occurs within three weeks of the receipt of recommendation from the Certification consultant.

David Kelley was selected as a field consultant for the W/DBE program; his function is to monitor the actual work being performed by W/DBEs on Agency projects and report these findings to the Compliance Officer. To date, Mr. Kelley has identifed a number of potential deficiencies in the commercially useful function being served by several DBEs--permitting timely action by Construction Division and Contract Administration staff while the project was still in progress. Mr. Kelley has also documented that the overwhelming majority of DBE participation being agreed to and committed in Agency contracts is actually occurring on the job in a real and commercially useful manner.

JAYCO Enterprises, Inc. will also be encouraging Vermont W/DBEs to use the Community College of Vermont during the winter shutdown months for courses relative to the highway construction industry and small business management. The Community College is a learning resource that the Agency intends to use to the fullest. It has the advantage of offering courses at locations throughout the state in an accredited educational system; we are able to provide this convenient educational opportunity to W/DBEs with only minor administrative costs.

**REGISTRY**

F.F.Y. 1985 saw a tremendous growth in the number of firm's certified as W/DBEs with the Agency. The current Registry lists 64 DBE contractors/suppliers compared to 34 in 1984; 26 WBE contractors/suppliers compared to 13 in 1984; 32 DBE supportive service firms compared to 27 in 1984 and 11 WBE supportive services firms compared to 9 in 1984. These increases occurred despite a loss of nine W/DBE firms removed under the procedures for administrative removal.

The Agency's Registry continues to be the reference list honored and used by a number of funding and contracting authorities including:

**Vermont Agency of Environmental Conservation** (U.S.E.P.A. funding)

**Vermont Agency of Development & Community Affairs** (various funding including H.U.D. and E.D.A.)

**Burlington International Airport** (F.A.A. funding)

**Chittenden County Transit Authority** (U.M.T.A. funding)

**Vermont Rural Transit Operations** (U.M.T.A. funding)

**AIP and AID Airport Construction Program** (F.A.A. funding)

## TUCK BUSINESS SCHOOL

The Agency has also expended a portion of its DBE Supportive Services funds to support the tuition cost for James H. Cossingham, the Project Director for JAYCO Enterprises, Inc., at Dartmouth College's Tuck Business School summer seminar for minority-owned business executives. The seminar had a substantial representation from firms located throughout the United States, and, in addition to enhancing Mr. Cossingham's capabilities as Project Director under his contract with the Agency, this seminar established some important contacts for the Agency in the minority business community. Congressman Parren J. Mitchell of Maryland, sponsor of important civil rights legislation, was keynote speaker at the final dinner for the seminar; Messrs. Pierce, Witham, and Carpenter traveled to Hanover to speak with Congressman Mitchell, hear his keynote address, and meet the other participants at the seminar.

## CIVIL RIGHTS SEMINAR

Prior to the commencement of the 1985 construction season in March the Agency sponsored a conference to provide guidance to the contracting community on the various civil rights regulations that are effective in their federal-aid contracts--including DBE requirements. The attendance at this conference was excellent (over 100) and most active Vermont contractors, subcontractors, and W/DBEs were represented.

## HARTFORD CIVIL RIGHTS CONFERENCE

In May, 1985 Messrs. Pierce, Witham and Carpenter attended the FHWA Region I Civil Rights Conference held in Hartford, Connecticut. This conference was an important forum for the discussion of DBE issues relevant to all state D.O.T.s including:

a. **Certification Reciprocity.** Most states were in agreement that the time for solidifying this concept was at hand. The Agency representatives endorsed this concept and illustrated its efficiency in their own certification program where no backlog of applicants exists.

b. **Mentor-Protege.** James Cossingham discussed this concept and presented his "general mentor-protege agreement." Vermont has taken the lead in implementing mentor-protege agreements and the monitoring methods were also discussed.

c. **Sanctions.** The DBE supplemental specification used by the Agency appears to have the right provisions to make prime contractors aware of their binding responsibility to fulfill their DBE commitments; the presentation of this specification by Mr. Witham was well received by the other states in attendence--many of whom felt that they should be working to adopt similar provisions in their contracts.

d. **Region I DBE Clearing House.** This is essential to the success of regional certification reciprocity and the Agency is encouraged that the Region I Civil Rights Office may establish such a clearing house.

## CONSTRUCTION MEETINGS

In mid-March, 1985 the Civil Rights Section participated in the training sessions held for Construction Division field personnel. In addition to guidance offered to Resident Engineers and Inspectors in Equal Employment Opportunity/Affirmative Action and Labor Compliance requirements on federal-aid contracts the aspects of the W/DBE Program relative to actual construction situation and field monitoring responsibilities were discussed.

Topics covered included the following items:

a. Explaination of what a WBE or a DBE is, and the importance of ownership and overall daily management and control of the firms operation.

b. The social and economic purpose of the DBE Program, its origins as law in the Surface Transportation Assistance Act of 1982 and the implementation of the law in the regulations of the federal-aid program of FHWA (as lead agency).

c. Explaination of what a specific DBE goaled project is--how the projects are chosen for goals, the bidding requirements of these projects, and the aspects of the actual construction of the project controlled by the DBE Supplemental Specification.

d. The DBE requirements of federal-aid projects that are not assigned specific DBE goals.

e. A discussion of commonly used terms in the DBE program including: commercially useful function, good faith effort/solicitation, and mentor-protege relationships.

f. How the Agency finds and certifies W/DBEs, and the function of the W/DBE Registry as a source list for the contracting community.

g. How W/DBE participation is counted including: equipment rental, suppliers, manufacturers, and subcontractors.

h. The Resident Engineer's role as the front line monitor of the actual participation by W/DBEs in federal-aid construction projects.

1985 was the second full construction season where in the requirements of STAA of 1982 were effective, and the first season where a 10% goal was set. The relative infancy of this program and its complicated requirements served as a real source of confusion for construction personnel in 1984; positive results of these meetings have been illustrated in the 1985 construction season by numerous referrals from Resident Engineers of potential problems with DBE participation on the projects.

Identified early in this way, these deficiencies were remedied by the Agency before the integrity and intent of the DBE Program was jeopardized.

## BENEFITS OF ORGANIZATIONAL STRUCTURE

The Agency continues to benefit from the inclusion of the Civil Rights Section as a part of the Contract Administration Division. The same individuals who administer the DBE Program also have responsibility for Equal Employment Opportunity and Affirmative Action Programs for the Agency, Labor Compliance review procedures, and Title VI Program. The Contract Administration Division prepares all contract documents for federal-aid projects, advertises bids, prequalifies contractors, distributes proposals to contractors, opens bids, and forwards the results of bids to the Chief Engineer. The proximity of DBE program personnel to the other staff and functions of the Contract Administration Division provides a knowledge of, and participation in these other functions. Contractors pick up and deliver proposals in the Contract Administration Office; DBE Program personnel meet and speak personally to active contractors, subcontractors, and W/DBEs on a regular basis. This face-to-face approach has resulted in a better understanding and acceptance of the program by the contracting community than might otherwise be possible.

All DBE Program personnel have extensive experience as construction Resident Engineers and Inspectors. This knowledge and experience is essential to the understanding of the realities of how DBE Subcontractor participation works on the project site.

CONCLUSIONS

In summary, the Agency is extremely encouraged by the success of the W/DBE Program in 1985--not only with the tangible success illustrated by the increased participation of minority and women-owned firms in Agency contracts, but also by the initial signs that through this program greater opportunity is developing for all women and minorities to attain a higher quality of life through an equitable control over the course of American business.

STATE OF VERMONT
AGENCY OF TRANSPORTATION
133 State Street, Administration Building
Montpelier, Vermont 05602

September 19, 1985

Mr. Karle Snyder, Division Administrator
Federal Highway Administration
Federal Building
Montpelier, Vermont 05602

Atten.: George Jensen, Assistant Division Administrator

Dear Mr. Snyder:

Re: W/DBE Annual Report - F.F.Y. 1985

Attached to this letter is the referenced report presented in two sections:

1. Updates - those policy and procedural items that have been changed in the operating manual for the Agency's W/DBE Program.

2. Highlights - The noteworthy accomplishments and events of the year.

Your comments will be appreciated; the Agency looks forward to a continued cooperative effort with your office in the administration of this important program.

Very truly yours,

Susan C. Crampton
Secretary

By: Thomas K. Pierce
Thomas K. Pierce
Chief of Contract Administration

SCC:TKP:JBC:sm

cc: JBC (2)✓
FHWA Liaison
1-2-3-1-8

BEST COPY AVAILABLE

# WOMEN-OWNED & DISADVANTAGED BUSINESS ENTERPRISE PROGRAM UPDATED FOR 1985

## CREDITING W/DBE PARTICIPATION

In accordance with 49 CFR Part 23.47(e), Section 3 of the Agency's policy "Crediting of W/DBE Participation" has been modified to allow 20% credit for legitimate W/DBE suppliers as defined by the regulation. The 20% credit allowed under the former policy for W/DBE's that broker equipment and personnel has been eliminated. The November 8, 1983 FHWA memorandum from R.A. Barnhardt to the Region 8 Division Administrator was used to further define the Agency's W/DBE credit policy relative to brokers, allowing only the actual brokerage fee to be credited towards meeting goals.

## REQUIREMENTS FOR CERTIFICATION

New policy concerning eligibility for certification were added to Section VI "Certification" of the Program. The policy states that as a condition of certification a six month waiting period will be required of firms where majority ownership has been transferred to a female/minority family member of the firm's owner or to a female/minority company employee. This waiting period will start at the time the female/minority person assumes ownership and control of the firm and extended to six months from that date. Minority and female owners may submit W/DBE certification applications to the Agency during the six month waiting period.

This requirement may be waived in special circumstances such as when the death of a male non-minority owner transfers ownership and control of a firm to a female or minority family member, a male non-minority owner retires, or legitimate buy-outs by non-relatives or employees.

This policy applies only to Vermont based firms applying for W/DBE certification through this Agency.

## MONTHLY REGISTRY UPDATE

Effective September, 1984 the W/DBE Registry, a listing of firms certified as owned and controlled by women and/or disadvantaged persons, was updated on a monthly basis. This action was taken to ensure that bidders on federal-aid contracts had the most current listing of W/DBE certified firms.

## COMPUTER DATABASE SYSTEM

Effective September, 1984 a computer database system was used by the Office of Contract Administration to generate the quarterly report of W/DBE participation in the federal-aid highway program. The database has also been improved since September with the addition of several new features including:

a. The addition of a new field that defines the specific DBE goal assigned to a particular project. The purpose of this is to allow the generation of an up-to-date list of DBE goaled projects and a total federal dollar share of funds intended for disadvantaged business participation.

b. Commitments made by bidders in contract/proposals are entered in the database to permit generation of total contract commitments to W/DBEs. The database also stores actual contract and subcontract awards to W/DBEs.

## OWNER/OPERATOR CERTIFICATION

An abbreviated certification application and review procedure for W/DBE owner-operators was instituted to allow the most expedient access to the program by this type of small business.

## ADMINISTRATIVE REMOVAL

Procedures were added to the Section "Removal from the W/DBE Registry by Administrative Action" to permit the removal from the list following the decertification of a W/DBE by its homestate.

## APPEALS AND THIRD PARTY COMPLAINTS

In the section concerning "Appeal Procedures" the following updates were made to ensure compatibility with U.S.D.O.T. "Guidelines for Processing W/DBE Certification Appeals and Third Party Complaints":

a. When the Agency initiates decertification of a W/DBE, the Agency will notify the W/DBE by certified mail return receipt of the contemplated decertification, briefly describe the reasons why decertification is contemplated, and offer the firm or individual an opportunity to respond to reasons for decertification stated therein. This differs slightly from our previous process in that our notice of contemplated decertification contains a date for a hearing before the Prequalification Committee that the firm must attend. By adopting this process the scheduling of a hearing for a firm that is not interested in challenging the decertification is eliminated.

b. In the section on removal from our certification list by administrative action an additional category for those firms who are decertified by another authority was added.

c. When a firm does not respond to a recertification update, a second update form (certified mail/return receipt) will be sent to the firm allowing 14 days following receipt to respond to the update before removal from the list of certified firms.

d. Written notifications in the third party challenge procedure will be sent certified mail return receipt and the Office of Civil Rights (O.C.R.) via Division Adminstrator will be included in these notifications.

e. In the appeal process provisions have been made for informal hearings or meetings to resolve differences.

f. In cases of decertification, certification denial, challenges and appeals provisions have been added to allow the Agency to make a referral for legal action if it appears the matter would have potential for initiation of a debarment action or criminal prosecution. This referral may be either to the Vermont Attorney General's office or the O.C.R. via the Division Administrator.

g. The status of a firm remains the same as it was prior to any certification, decertification, appeal or challenge procedures during the pendency of these procedures.

## NEW CERTIFICATION APPLICATION

Beginning in December, 1984 the "Disadvantaged/Women Owned Businesses Certification Application" recommended by the FHWA Region I Certification Task Force was adopted for use by the Agency.

## MENTOR-PROTEGE AGREEMENT

In April, 1985 a new "General Agreement Covering Mentor-Protege Relations," developed by the Agency's DBE Supportive Services consultant-JAYCO Enterprises, Inc. was adopted.

## SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS

Added to Section VI "Certification" are definitions and criteria relative to socially and economically disadvantaged individuals who are not members of a minority group as defined by the program. This update states that individuals who are not presumed to be socially and economically disadvantaged by virtue of membership in one of these groups may, nevertheless, be found to be socially and economically disadvantaged on a case-by-case basis. If an individual requests that his or her business be certified as an eligible disadvantaged business, the Agency, as part of its certification process, will make a determination of social and economic disadvantage.

In making determinations of social and economic disadvantage, the Agency will be guided by the following standards:

a. The individual's social disadvantage must stem from his or her color, national origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause beyond the individual's control. The individual cannot establish social disadvantage on the basis of factors which are common to small business persons who are not socially disadvantaged. For example, an individual predicating a social disadvantage claim on denial of bank credit to his or her firm would have to establish that the denial was based on one or more of the listed causes, or similar causes - not simply on the individual's or the firm's marginal financial status.

b. The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged. This can be demonstrated, for example, by describing specific instances of discrimination that the individual has experienced, or by recounting in some detail how his or her development in the business world has been thwarted by one or more of the listed causes or similar causes. In assessing these facts the Agency will consider prior administrative or judicial findings of discrimination experienced by the individual.

c. The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

d. The individual's social disadvantage must be chronic, longstanding, and substantial, and demonstrate a series of obstacles which have impeded one's progress in the business world.

e. In addition to a personal statement from the individual claiming to be socially disadvantaged such evidence may be: third party statements, copies of administrative or judicial findings of discrimination, and other documentation in support of matters discussed in the personal statement. The Agency will consider the applicant's education, employment, and business history; the individual may present evidence relating to other matters as well. Moreover, the attainment of a quality education or job should not absolutely disqualify the individual from being found socially disadvantaged if sufficient other evidence of social disadvantage is presented to the Agency.

Other evidence considered in the determiniation of social and economic disadvantage are:

- Denial of access to business and/or professional schools.
- Denial of equal access to education curricula.
- Exclusion from social and professional organizations.
- Denial of professional or educational honors.
- Social patterns or pressures which have discouraged the individual from pursuing a professional or business education or career.
- Discrimination in hiring promotion and/or professional advancement, pay/wages and fringe benefits, or disciplinary actions in education or employment.
- Unequal access to credit or capital.
- Inability to acquire credit or the necessity or mandate to acquire credit under unfavorable circumstances.

The Agency will make a determination as to whether the applicant firm and its owner(s) are in a more difficult social and economic situation than most firms and owners who are not disadvantaged. The applicant must also demonstrate that the firm is 51 percent owned by socially and economically disadvantaged individual(s) that this (these) individual(s) control the day-to-day management of the firm, and that the firm meets such other requirements for eligibility as a DBE described in this program.

## CONTRACTING AND SUBCONTRACTING POLICY

Most DBEs working in Vermont are subcontractors and the Civil Rights Section was instrumental in the preparation of a Policy on Contracting and Subcontracting defining the commercially useful function that must be served by any contractor/subcontractor, allowable subcontracting, performance requirements of contractors, payroll requirements, and the responsibility of all contractors to ensure the maximum participation of W/DBEs in federal-aid contracts. The policy was subsequently approved by the Vermont Transportation Board and withstood the scrutiny of the Vermont Administrative Procedures Act review. With this policy in place the participation of any contractor/subcontractor, regardless of ownership, must meet requirements that prevent project brokerage, and enhance the benefits of the competitive bidding process.

## AUDIT AND MONITORING PROCEDURES

In the Fall of 1984 the Agency implemented a pre-award audit/review of the low bidder's success in meeting the requirements set forth in the DBE supplemental specification (on specific DBE goaled projects).

The following criteria is evaluated prior to awarding these contracts:

a. Review DBE certification file to determine:

1. Certification - The DBE is certified by Vermont Agency of Transportation and the certification is current.

2. Scope of Work - The DBE is capable of constructing items of work listed in contract proposal. The items of work to be subcontracted to DBE are listed in the DBE's scope of services.

b. Contact with the DBE to determine that the apparent low bidder actually negotiated with the DBE for items, quantities, and prices, identifed in the bid proposal.

c. Contact DBE and apparent low bidder to assure the following criteria will be met by the DBE subcontractor:

1. Supervision - The DBE will provide adequate supervisory personnel to oversee the subcontracted work.

2. Work Crews - The DBE will provide work crews to accomplish subcontracted work.

3. Payrolling - The required payroll procedures will be adhered to by the DBE Subcontractor.

4. Materials - The DBE will purchase and provide required materials to fulfill subcontract requirements and maintain supporting invoices verifying purchases of these materials.

5. Equipment -The DBE will furnish necessary equipment to accomplish subcontracted work and provide rental or ownership documentation of this equipment.

6. Commercially Useful Function - The DBE will provide a commercially useful function as specified in Agency Contracting and Subcontracting Policy.

d. Special Arrangements are evaluated including:

1. Will the DBE rent or lease equipment from the prime? Are there or will there be written lease agreements?

2. Is the prime contractor providing the DBE with working capital on the project?

3. Is the prime contractor or any other contractor loaning the DBE supervisory personnel or labor to accomplish the subcontracted work?

The award of the contract is based on the apparent low bidders responsiveness to the requirements of the specification and evidence revealed through this audit that the DBE participation scheduled in the proposal will meet relative Agency and Federal requirements.

To date, this entire procedure has normally been conducted and completed on the bid date with a recommendation for award made. Few delays in contract award have been caused by the procedure and the contracting community has generally been receptive to and appreciative of this effort to prevent a potential non-compliance situation before contracts are signed.

## VERIFICATION OF PAYMENTS TO DBES

Beginning with the 1985 season the Compliance Officer required that prime contractors on DBE specific goaled projects submit verification of payments made to the DBE(s) on their project. This requirement was implemented to further document that prime contractors are actually achieving the level of DBE participation originally obligated in their contract.

In a related matter, the DBE Liaison Officer will now be notified by the Construction Division of scheduled dates for final project inspection. If verification of payments to the DBE equal to the amount originally obligated in the contract has not been submitted the Compliance Officer the Construction Division and Financial Management will be notified that final contract payments should be held pending the contractor's satisfaction of this requirement. This procedure was instituted as a result of advice received from Carl Gottschall from F.H.W.A. Region I, Office of Engineering and Operations.

STATE OF ALABAMA
HIGHWAY DEPARTMENT
MONTGOMERY, ALABAMA 36130

GEORGE C. WALLACE
GOVERNOR

RAY D. BASS
HIGHWAY DIRECTOR

# TESTIMONY BEFORE THE TRANSPORTATION SUBCOMMITTEE OF THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Relating to

## A REVIEW OF SECTION 105(f) OF THE 1982 STAA

by

RAY D. BASS
Director
STATE OF ALABAMA HIGHWAY DEPARTMENT

Tuesday - November 19, 1985
Room 406
Dirksen Senate Office Building

Mr. Chairman and members of the Committee, my name is Ray D. Bass, Highway Director of the State of Alabama Highway Department.

Minorities in Alabama, specifically blacks, have been a very strong part of the highway construction industry. Evidence of this is shown by the following facts. Of the total contractor work force employed in highway construction in Alabama during 1983-84, 35.2% were black while in 1984-85, 40.7% were black. The involvement of minorities has been in the area of laborers, skilled laborers and some low level management positions. The area in which there has been little involvement of the minorities in our highway construction industry has been in the area of high level management and the financial aspects of highway construction. These are the areas that are the weakest and are the areas that, in my opinion, needed more attention and continues to need attention.

It is my feeling that the reason minorities have not been involved in the area of high level management, financial matters and the prime contracting arena is because of the fact that highway contracting is a very high risk endeavor. The profit margin is marginal to low and the risks are extremely high. Also in the highway construction industry, work must be performed under stringent design, specification and inspection procedures. These requirements are significantly more stringent in the highway construction industry than in other related fields of construction.

From the inception of the Minority Business Enterprise Program to the present day Disadvantaged Business Enterprise/Women Business Enterprise Programs of the Surface Transportation Assistance Act of 1982, there have been significant problems to achieving the anticipated results of these programs which I envision was to move the DBE's and WBE's into the arena of being able to participate in highway construction activities as viable contractors. The main problems seem to have been centered around such firms having the financial and bonding capabilities to perform in this high risk low profit construction arena.

With the beginning of the MBE Program in 1975, the states, as well as the construction industry, was under considerable pressure to meet specific goals or face the probability of withholding of Federal Highway Construction Funds. The program began in Alabama, utilizing the good faith efforts as a means of trying to reach an MBE goal. With passage of the Surface Transportation Assistance Act of 1982 a mandatory 10% goal was established. Due to the situation that there simply was not available the necessary capacity of minorities to reach this goal, there was extreme pressure on both the Highway Department and the non-minority construction industry. There was a continual hassel in regard to the determination of good faith efforts between the non-minority contractor, the State Highway Department and the Federal Highway Administration. Good faith efforts are subject to different interpretations and this led to much confusion and continual discussion among the parties concerned. It became evident that the Department could not reach a 10 percent goal.

The Alabama Highway Department then made the decision to apply to its contracts a clause requiring the contractor to meet a specific goal for a given project or face a penalty. This was done in an effort for the Department to reach the overall goal of 10 percent and not face the probability of losing Federal funds since the State is very dependent upon the Federal Aid Construction Program to develop its transportation system. This clause provided an incentive to the contractor if he exceeded the pre-established goal for a given project and a penalty clause if he did not reach the pre-determined goal for that given project. This effort did lead to the Department reaching and exceeding the 10 percent goal for Disadvantaged Business Enterprise, but it was felt that a good portion of this work was superficial and questionable as to whether it was real involvement or a front or sham.

This constant pressure on the non-minority construction industry continued to cause problems in relation to meeting a specific goal. The non-minority contractor had to expend considerable effort in recruiting and developing of DBE's. This involved assisting with banking, financing, bonding, equipment, management and all other related aspects of the contracting industry. Many of these activities then gave the appearance of fronts and shams instead of viable DBE's. This, then led to a continual confrontation between the construction Industry, the Highway Department and the Federal Highway Administration of certifying which DBE firms were legitimate viable firms and those who actually were simply fronts or shams.

The act establishing the program was very general in nature and did not specifically address the various problems of drawing non-existing highway construction capabilities from other construction and business resources and molding them into viable highway construction organizations. A sufficient number of minority firms capable of performing 10% of the nations highway construction simply does not exist. If this is to be accomplished, such firms must be developed. This cannot be done overnight but must be developed over an extended period of time in order to avoid complete chaos in our highway construction industry.

Under the present procedures the Federal Highway Administration developed guidelines and rule making so that their personnel, as well as State personnel could administer the program. These guidelines and rules developed by FHWA pertain to such aspects as equipment rentals/leases, trucking, amount of DBE involvement in operations in order to receive credit, definitions of terms such as "commercially useful function", "good faith efforts" and many other related items. All of these items are subject to different interpretations and have led to a continual confusion among all the parties involved.

After several months of utilizing the incentive clause in our contracts, the Department determined that this effort was possibly leading to development of fronts and shams. It appeared from information received throughout this Nation that this problem was not simply one unique to Alabama. We found in Alabama the major areas of involvement of DBE's/WBE's was in the specialty contractor type areas. There was very little participation of DBE's/WBE's bidding as prime contractors. Many long standing non-minority specialty contractors were being forced out of business or were either being forced into questionable business arrangements with a DBE or WBE contractor in an effort to stay in business. The reason they were being forced to do this was because the non-minority contractor, in an effort to meet his minority participation goal, had to go to the specialty contractors who were either DBE's of WBE's.

The Department has gone back to utilizing the good faith efforts since, in our opinion, the incentive clause, although meeting a goal regarding a monetary value, was not bringing DBE's into a viable highway contracting situation.

Mr. Chairman, I have responded in written form to the eight questions posed by the committee for inclusion in my testimony. I will not address them orally at this time but request they be made a part of the record in their written form. I will also be glad to answer any questions regarding my response to those questions at the conclusion of my testimony.

Mr. Chairman, in summary, it is my opinion if the real intent of Section 105(f) of the Surface Transportation Assistance Act of 1982 is to be accomplished, certain actions appear to be in order.

1. Eliminate the mandatory 10% goal.
2. Establish a Federal Funded bonding and financial program well defined by an Act.

3. Establish an educational and training program oriented toward highway construction management.

4. Establish a certification of DBE's on a nationwide basis by the Federal Highway Administration.

If those firms are to become viable contracting firms, it is imperative that a Federal Funded bonding and financial program be made available so that these firms can gain the necessary training, experience and management skills to participate in this highly competitive construction field. A uniform certification process that is administered by the Federal Highway Administration is essential. This federally administered certification process would then provide all states with the same list of certified firms from which non-minority contractors could draw minority participation.

Mr. Chairman, this concludes my prepared testimony and I will be glad to respond to any questions or comments at this time.

STATE OF ALABAMA
HIGHWAY DEPARTMENT
MONTGOMERY, ALABAMA 36130

GEORGE C. WALLACE
GOVERNOR

RAY D. BASS
HIGHWAY DIRECTOR

WRITTEN RESPONSE TO INFORMATION REQUESTED
by the
SUBCOMMITTEE ON TRANSPORTATION
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Relating to

A REVIEW OF SECTION 105(f) OF THE 1982 STAA

SUBMITTED BY

RAY D. BASS
Director
STATE OF ALABAMA HIGHWAY DEPARTMENT

November 19, 1985

1.

Q. What is the capacity for DBE'S and WBE'S for highway construction work?

A. At the present time, our most accurate means of estimating DBE/WBE capacity is past performance. At the beginning of F.Y. 84-85 we had a total of 319 firms on our Certified List. Of these, 253 were DBE'S and 66 were WBE'S. Additions and deletions were made on a monthly basis giving a total of 245 firms on the Certified List at the end of F.Y. 85 (294 DBE'S and 51 DBE'S). Only ninety-three (93) of the two-forty-five (245) have had active Prime or Sub-Contracts. Twenty four (24) of the 93 have since been decertified or otherwise removed from our list. This leaves a total of 69 apparent legitimate firms (57 DBE'S & 12 WBE'S) that have received contracts.

2.

Currently, how many DBE'S and WBE'S are bidding as prime contractors for highway contruction work?

| DBE'S | WBE'S |
|---|---|
| 12 | 5 |

Six of the DBE'S and two of the WBE'S were established before the Surface Transportation Assistance Act of 1982.

Q. How can more DBE & WBE firms be developed as Prime Contractors?

A. Most DBE'S and WBE'S are relatively new and are unable to acquire financing and bonding. They have little capital and rent or lease most of the equipment used. Without equipment or capital to obtain supplies and personnel a new DBE gives the appearance of a sham or front and this leads to difficulty in certification, especially if the new DBE has not had work. The establishment of a federal financial and bonding program, could assist new DBE'S in acquiring the necessary equipment, supplies and personnel.

3.

Q. What effect has the Section 105(f) program had on non-minority specialty contractors and WBE'S?

A. The majority of DBE'S have gone into the specialty type contracting business due to the relatively small amount of strart up capital required. This hus had an adverse effect on non-minority specialty contractors by forcing the Prime Contractors to use the DBE in order to meet their goals.

Q. If there have been adverse effects, how should they be addressed?

A. By eliminating the mandatory 10% goal and by establishing a Federal-type bonding and finance program which would educate and prepare participants in the areas of finance and management and provide specific financial support for bonding.

4.

Q. What kind of certification process for DBE and WBE firms should be required?

A. The establishment of a Federal Certification Process. This process should be handled by the FHWA and a Certified List should be furnished to the states.

Q. Should the process be uniform?

The establishment of a Federal Certification Process would assure uniformity.

5.

Q. What kinds of training, financial or other technical assistance are needed by DBE and WBE firms?

A. The types of training needed are the ones that help the DBE'S and WBE'S to organize and operate a viable construction business. Training in the areas of bidding, estimating and financial management should be mandatory in order to qualify for financial and bonding assistance. This could be accomplished through agreements with colleges annd universities on a technical assistance program. Financial assistance could best be served by establishing a well controlled Federal Bonding and Financial Assistance Program.

6.

Q. What, if any, additional cost does the Section 105(f) program add to the Federal-aid highway program?

A. The additional cost, according to an AASHTO survey of states, averages 5%. The reasons being the Prime Contractor having to accept quotes that are higher in order to meet his requirements. Also, the Prime is having to sublet work he normally would do himself, thereby inducing a less efficient construction operation. Increase costs associated with contract performance --- financial uncertainties associated with working with unknown, underfinanced or inexperienced DBE'S also adds to the cost.

7.

Q. What, if any, experience have you had with firms that do not appear to be legitimate firms?

A. We have had numerous experiences with firms that do not appear to be legitimate, and also firms that are not legitimate. In most instances the firms involved are specialty contractors who have experienced an adverse effect upon their business. These associations have brought about fronts which give the appearance of being DBE's but allow the established firm to do business as usual thus circumventing the program. Other cases involve out-of-state DBE'S particularly in the petroleum product industry where certification has proven to be most difficult. We have denied certification to 22 firms and have decertified 17 firms within the last 2 years.

Q. How can the fraudulent use of this program be prevented?

A. By providing a Federal Bonding and Financial Assistance program along with a Federal Certification Program. The Federal Bonding and Financial Assistance Program would enable a DBE to enter into areas other than the specialty - type highway construction work and would help to alleviate the non-minority from joining forces with a DBE in order to recoup part of his losses. A Federal Certification Program would assure the states & construction contractor's of viable DBE'S.

7.

Page 2

Also, the 20% rule involving material suppliers could be modified to allow for suppliers that don't meet the existing guidelines to qualify. Firms that do not maintain an inventory, carry goods manufactured by a number of different companies and package and ships goods but do serve a useful function should be counted. An example would be a bona-fide, licensed broker of petroleum products.

8.

Q. How have states with small minority populations been able to meet the DBE requirements?

A. We question whether states with small minority populations have been able to legitimately meet the DBE requirements. It is our opinion that unless minority firms existed prior to the Surface Transportation Assistance Act of 1982 that not many legitimate minority firms have been established as a result of this program. These would be prime areas to look for fronts and shams.

NAMC NATIONAL ASSOCIATION OF MINORITY CONTRACTORS
1250 EYE STREET, N.W. SUITE 505 WASHINGTON, D.C. 20005 (202) 347-8259

TESTIMONY BY

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

PRESENTED TO

UNITED STATES SENATE
TRANSPORTATION SUBCOMMITTEE OF THE ENVIRONMENT
AND PUBLIC WORKS COMMITTEE

ON

SECTION 105 (f) OF THE
SURFACE TRANSPORTATION ASSISTANCE ACT (STAA) OF 1982

NOVEMBER 19, 1985

RALPH C. THOMAS, III
EXECUTIVE DIRECTOR

JAMES A. FREEMAN
PRESIDENT

---

A FULL SERVICE MEMBERSHIP CONSTRUCTION ASSOCIATION
WORKING FOR A BETTER CONSTRUCTION INDUSTRY

MR. CHAIRMAN, MY NAME IS RALPH C. THOMAS, III, AND I AM THE EXECUTIVE DIRECTOR OF THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS (NAMC). NAMC IS A FULL SERVICE, NON-PROFIT MINORITY BUSINESS TRADE ASSOCIATION ESTABLISHED IN 1969 TO ADDRESS THE NEEDS AND CONCERNS OF MINORITY CONSTRUCTION CONTRACTORS NATIONWIDE.

CURRENTLY, NAMC's MEMBERSHIP BASE COVERS 40 STATES, THE DISTRICT OF COLUMBIA AND THE VIRGIN ISLANDS. WE ARE HEADQUARTERED IN WASHINGTON, D.C. NAMC MEMBERS INCLUDE GENERAL CONTRACTORS, SUBCONTRACTORS, CONSTRUCTION MANAGERS, MANUFACTURERS, SUPPLIERS, LOCAL MINORITY CONTRACTOR ASSOCIATIONS AND FUNDED TECHNICAL ASSISTANCE ORGANIZATIONS. WE HAVE APPROXIMATELY 2,500 ACTIVE MEMBERS.

THIS TESTIMONY WILL DEAL WITH SPECIFIC POINTS OF YOUR CONCERNS REGARDING SECTION 105(f) OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982 AS EXPRESSED IN YOUR LETTER TO US DATED NOVEMBER 5, 1985. SECTION 105(f), OF COURSE, MANDATES THAT A MINIMUM OF 10 PERCENT OF THE FUNDS EXPENDED UNDER THE SURFACE TRANSPORTATION ASSISTANCE ACT GO TO SMALL BUSINESSES OWNED AND CONTROLLED BY SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS.

## I. CAPACITY OF DBEs FOR HIGHWAY CONSTRUCTION WORK

THE CAPACITY FOR DISADVANTAGED BUSINESS ENTERPRISES (DBE) TO PERFORM HIGHWAY CONSTRUCTION WORK IS CERTAINLY NOT WHAT IT COULD BE. HOWEVER, WE MUST REALIZE, MR. CHAIRMAN, THAT THIS PREDICAMENT IS NOT ENTIRELY THE FAULT OF THE DBEs. IN THE CASE OF THE MINORITY CONTRACTOR IT CAN BE SAFELY STATED THAT HIS PRESENT DISADVANTAGED

POSITION IN THE FIELD OF HIGHWAY CONSTRUCTION IS THE DIRECT RESULT OF HISTORICAL EXCLUSION. SUCH EXCLUSION EXTENDED TO SPECIALIZED EDUCATION, CRAFT TRAINING, MANAGEMENT POSITIONS, FINANCING AND BONDING PROGRAMS AND SUBCONTRACTING OPPORTUNITIES.

THAT IS WHY, MR. CHAIRMAN, THE PASSAGE OF SECTION 105(f) WAS SUCH A NOBLE EFFORT ON THE PART OF CONGRESS. CONGRESS HAS ALREADY MADE A FINDING IN ITS PASSAGE OF SECTION 8(a) OF THE SMALL BUSINESS ACT THAT THERE EXISTS IN THIS COUNTRY A CORRELATION BETWEEN ETHNICITY AND SOCIAL AND ECONOMIC ADVANTAGE. MOREOVER, CONGRESS HAS FOUND THAT IT IS IN THE NATIONAL INTEREST TO EXPEDITIOUSLY AMELIORATE THIS SITUATION IN ORDER TO OBTAIN BOTH SOCIAL AND ECONOMIC EQUALITY AND TO IMPROVE THE FUNCTIONING OF OUR ECONOMY.

IT WAS IN SUCH SPIRIT THAT SECTION 105(f) WAS PASSED. THUS, MR. CHAIRMAN, WHEN WE START ASKING QUESTIONS ABOUT THE "CAPACITY" OF DISADVANTAGED BUSINESSES TO DO HIGHWAY CONSTRUCTION WORK, WE MUST ALSO KEEP IN MIND THAT A MAJOR PURPOSE OF THE SUBJECT LEGISLATION WAS TO DEVELOP A MARKETABLE CAPACITY AMONG A SIGNIFICANT NUMBER OF DBEs TO PERFORM HIGHWAY CONSTRUCTION WORK. HAVING ADDRESSED THAT POINT, WE MUST THEN ASK WHAT HAS BEEN DONE SINCE THE INITIAL PASSAGE OF SECTION 105(f) TO ASSURE THAT A SIZEABLE NUMBER OF DBEs ARE DEVELOPED UNDER SUCH PROGRAM TO PERFORM HIGHWAY CONSTRUCTION WORK. THIS LEADS ME TO MY NEXT POINT.

## II. DBEs AS PRIME CONTRACTORS

WITHOUT HAVING ANY RAW STATISTICS AT HAND, IT IS, NEVERTHELESS MY SENSE, MR. CHAIRMAN, THAT THERE ARE NOT AN APPRECIABLE NUMBER OF DBEs BIDDING FOR HIGHWAY CONSTRUCTION WORK AS PRIME CONTRACTORS. A MAJOR REASON FOR THIS DILEMMA IS BECAUSE OF LESS THAN ADEQUATE OUTREACH MECHANISMS THAT ENCOURAGE DBE PARTICIPATION IN PROJECTS COVERED BY 105(f) ON THE STATE LEVEL. UNLESS ADEQUATE EFFORTS ARE MADE TO INFORM AND ASSIST DBEs TO PARTICIPATE, SUCH FIRMS WILL NOT BE AFFORDED AN OPPORTUNITY TO TAKE ADVANTAGE OF THE PROGRAM AND BECOME QUALIFIED CONTRACTORS IN THE ROAD BUILDING INDUSTRY.

## III. ADVERSE EFFECTS OF PROGRAM ON NON-MINORITY CONTRACTORS

WHEN WE SPEAK OF THE POSSIBLE ADVERSE EFFECTS WHICH THE 105(f) PROGRAM MAY HAVE OR HAS HAD UPON NON-MINORITY SPECIALTY CONTRACTORS WE MUST ADDRESS SUCH CONCERNS IN THE CONTEXT OF THE PURPOSE OF THE PROGRAM.

FOR EXAMPLE, IF WE DEFINE "ADVERSE EFFECTS" TO MEAN THAT A MAJORITY CONTRACTOR FEELS THAT HE DID NOT GET A ROAD BUILDING CONTRACT BECAUSE OF A STATE'S OBLIGATION TO MEET DBE GOAL REQUIREMENTS, SUCH INCIDENT SHOULD NOT BE OUR PRIMARY CONCERN IN THE CONTEXT OF THESE PROCEEDINGS. THE PURPOSE OF 105(f), AFTER ALL, IS THE MERE USE OF YET ANOTHER PROGRAM TO ASSIST IN THIS COUNTRY'S COMMITMENT TO REPAIR THE PRESENT DISADVANTAGED POSITION OF AN ENTIRE SEGMENT OF OUR SOCIETY.

NEVERTHELESS, MR. CHAIRMAN, THERE ARE ADVERSE EFFECTS SUFFERED BY NON-MINORITY CONTRACTORS IN THE CONTEXT OF THE PRESENT IMPLENTATION OF 105(f) OF WHICH WE SHOULD BE CONCERNED. THE INADEQUATE OUTREACH OF THE 105(f) PROGRAM TO MINORITY CONTRACTORS UNDULY BURDENS THE NON-MINORITY CONTRACTORS IN THEIR EFFORTS TO FORM JOINT VENTURES AND/OR SUBCONTRACTS WITH SUCH MINORITY FIRMS. IN ORDER TO FULFILL THE INTENT OF THE PROGRAM NON-MINORITY FIRMS MUST ADEQUATELY AND CONSISTENTLY BE PROVIDED WITH THE NAMES AND COMPANY PROFILES OF MINORITY FIRMS AVAILABLE FOR JOINT VENTURE AND SUBCONTRACTING OPPORTUNITIES. THERE SHOULD ALSO BE STEPPED-UP EFFORTS ON THE PART OF STATES TO BRING THE TWO GROUPS TOGETHER. WE CANNOT SET UP A PROGRAM IN WHICH REQUIRE THE NON-MINORITY CONTRACTOR TO MEET CERTAIN CRITERIA AND THEN LEAVE HIM DANGLING DUE TO A LACK OF INFORMATION.

## IV. THE CERTIFICATION PROCESS

THE PROCESS OF CERTIFYING FIRMS AS SOCIALLY OR ECONOMICALLY DISADVANTAGED SHOULD BE UNIFORM FOR ALL STATES. THE PRESENT SITUATION, IN WHICH EACH STATE USES ITS OWN CRITERIA , LEADS TO CONFUSION, FRUSTRATION AND NON-PRODUCTIVITY. MORE IMPORTANTLY, SOME STATES HAVE EITHER VERY LAX CERTIFICATION REQUIREMENTS OR NONE AT ALL. THIS INVITES THE DISTASTEFUL DILEMMA OF FIRMS "FRONTING" AS MINORITY FIRMS.

SHOULD

AT THE VERY LEAST, WE FEEL THAT STATES/DEVELOP RECIPROCITY LAWS IN WHICH ONE STATE CAN ACCEPT THE CERTIFICATION PROCESS OF ANOTHER.

## V. TRAINING, FINANCIAL AND TECHNICAL ASSISTANCE

MINORITY FIRMS CONTINUE TO REQUIRE MANAGEMENT TRAINING, TECHNICAL ASSISTANCE AND ACCESS TO FINANCING AND BONDING OPPORTUNITIES. THERE PRESENTLY EXISTS VARIOUS PROGRAMS WHICH HAVE THE CAPACITY TO ENHANCE THE PARTICIPATION OF MBEs IN THE 105(f) PROGRAM. HOWEVER, VERY FEW OF THESE PROGRAMS HAVE THE FULL NATIONAL NETWORKING CAPACITY, SYSTEMS AND RESOURCES TO MAKE THE NECESSARY IMPACT. WE RECOMMEND THAT THE GOVERNMENT WORK MORE CLOSELY WITH NATION AND LOCAL TRADE ASSOCIATIONS AND ORGANIZATIONS AS A NETWORKING VEHICLE. MEMBERSHIP TRADE ORGANIZATIONS ARE ABLE TO NETWORK ON A MORE PERSONAL AND EFFECTIVE BASIS IN BOTH THE MINORITY AND MAJORITY COMMUNITIES.

## VI. ADDITIONAL COST OF 105(f) PROGRAM

MR. CHAIRMAN, THERE MAY SOMEWHAT OF A SHORT-TERM ADDITIONAL COST TO THE FEDERAL -AID HIGHWAY PROGRAM IN THESE INITIAL STAGES OF THE IMPLEMENTATION OF 105(f). HOWEVER, IT MUST BE REMEMBERED THAT SUCH ADDITIONAL COST IS A MERE INVESTMENT TOWARD THE LONG-TERM RESULTS OF A SUCCESSFUL PROGRAM. MINORITY COMPANIES CONTINUE TO BE THE LARGEST EMPLOYER OF MINORITIES. THE EMPLOYMENT DEMAND OF MINORITIES IS PROJECTED TO INCREASE SUBSTANTIALLY FOR THE REMAINDER OF THE DECADE. THE SUCCESS OF THE 105(f) PROGRAM CAN

GO A LONG WAY TOWARD MEETING THAT INCREASED EMPLOYMENT DEMAND AND SAVE THE FEDERAL GOVERNMENT HUNDREDS OF MILLIONS OF DOLLARS IN UNEMPLOYMENT PAYMENTS. MOREOVER, THE GOVERNMENT WILL GREATLY BENEFIT IN THE FORM OF A SUBSTANTIAL INCREASE IN CONTRIBUTIONS TO TAX REVENUES BY THE MINORITY COMPANIES WHICH BECOME SELF-SUFFICIENT UNDER A PROPERLY IMPLEMENTED 105(f) PROGRAM.

### VII. FRAUDULENT DBE FIRMS

FIRMS THAT ARE FRAUDULENTLY SET UP AS DBE CONTINUES TO BE SOMEWHAT OF A PROBLEM. HOWEVER, THIS PROBLEM CAN BE ALLEVIATED BY AN EFFECTIVE CERTIFICATION PROGRAM.

### VIII. STATES WITH SMALL MINORITY POPULATIONS

ONCE AGAIN, MR. CHAIRMAN, WE RECOMMEND THE DEVELOPMENT OF AN EFFECTIVE AND WIDE-REACHING NETWORKING PROGRAM BY STATES WITH SMALL MINORITY POPULATIONS IN ORDER TO FULFILL THEIR DBE REQUIREMENTS. NATIONAL TRADE ASSOCIATIONS SUCH AS NAMC COULD CONTRIBUTE GREATLY TO PROVIDING SUCH STATES WITH QUALIFIED AND COMPETENT CONTRACTORS. IT WOULD ALSO BENEFIT THE DBEs SO FAR AS THEIR GROWTH AND DEVELOPMENT POTENTIAL TO BE ABLE TO WORK IN OTHER STATES.

### VIII. CONCLUSION

THIS CONCLUDES MY TESTIMONY, MR. CHAIRMAN. WE LOOK FORWARD TO WORKING WITH AND ASSISTING YOUR SUBCOMMITTEE IN ANY WAY WE CAN IN THE FUTURE. I AM NOW READY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

**NHACE**
**NATIONAL HISPANIC ASSOCIATION OF CONSTRUCTION ENTERPRISES**

November 18, 1985

The Honorable Steve Symms
Chairman
Subcommittee on Transportation
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Symms:

The National Hispanic Association of Construction Enterprises is pleased to submit its testimony to the subcommittee on Transportation.

We look forward to the hearings, we remain,

Very Truly Yours,

National Hispanic Association
of Construction Enterprises

Roberto Cervera Rojas
National Executive Director

Enclosure

1625 Eye Street, NW, Suite 1002, Washington, DC 20006 (202) 293-0001/Toll Free 1-800-554-8200

# TESTIMONY TO THE SUBCOMMITTEE ON TRANSPORTATION

(1) What is the capacity for Disadvantaged Business Enterprises (DBEs) and Women Business Enterprises (WBEs) for highway construction work?

Many of NHACE's constituents are General Contractors who can and have performed Highway construction work. We have members in Connecticut Utah, New York, and California who have successfully performed highway construction work.

(2) Currently, how many DBEs and WBEs are bidding as prime contractors for highway construction work? How can more DBE and WBE firms be developed as prime contractors?

NHACE has no way of determining how many are bidding as prime contractors for highway construction work.

As it relates to the second half of the question, NHACE will be implementing a project in 1986 which will increase the number of minority and women businesses capable of competing as primes.

The two major aspects of the project concern Loans and Bonds.

NHACE will be developing the ability of its members to aspect loans and bonds by getting them "Loan and Bond Ready"

This means that all necessary documents with supporting data will be completed prior to the firm actually needing the Loan or bond. Therefore, when the firm requests or applies for the Loan or Bond the only information needed would be a current financial statement.

By these firms being "Loan and Bond Ready" it will put them in a very competitive position.

(3) What effect has the section 105 (f) program had on non-minority specialty contractors and WBEs? If there have been adverse effects, how should they be addressed?

Non-minority specialty contractors have not been adversily affected by section (105)(f).

(4) What kind of certification process for DBe and WBE firms should be required? Should the process be uniform for all States?

NHACE recommends that Schedule A and Schedule B be adopted and used by all states.

The certification should be done by the U.S. Department of Transportation or their agent.

DOT should have an automated system in which state DOTs could access the certification data base electronically.

In this way, there would only be one agency responsible for certification and only one source to go to for certification lists.

(5) What kinds of training, financial or other technical assistance are needed by DBE and WBE firms? Should this kind of assistance qualify towards the ten percen goal?

Assistance to DBEs or WBEs should never qualify towards the utilization goals.

The federal and state governments along with Private sector entities should pool their resources, financial and others, to deliver a program which provides business development assistance to DBEs and WBEs.

(6) What, if any, additional cost does the section 105(f) program add to the Federal-aid highway program?

NHACE is not familiar with any additional costs caused by Section 105(f).

(7) What, if any, experience have you had with firms that do not appear to be legitimate firms? How can the fraudulent use of this program be prevented?

NHACE has not had any first hand experience with "fronts".

A vigorously enforced certification evaluation process would cut back if not prevent the use of "fronts".

(8) How have States with small minority populations been able to meet the DBE requirements? What, if any, problems have they had in attracting out-of-State DBE firms?

NHACE is not aware of any state who has had difficulty in meeting the requirements.

It is our understanding that those states have issued more contracts to DBEs than previously and they seek DBEs from nearly states.

TESTIMONY TO THE SUBCOMMITTEE ON TRANSPORTATION
November 19, 1985

Good Morning, Mr. Chairman, Members of the Subcommittee, fellow colleagues, ladies and gentleman.

My name is Roberto Cervera Rojas. I am the National Executive Director of the National Hispanic Association of Construction Enterprises (NHACE). NHACE was founded in November 1980 and now represents the interests of some 27,000 Hispanic construction related enterprises.

It is with extreme pleasure and excitement that I come to present testimony before you today.

The excitement is from having the opportunity to address some very crucial concerns Hispanic Construction Enterprises have regarding the implementation of the STAA of 1982 and specifically section 105(f), subpart D of 49 CFR Part 23.

Our efforts to answer the questions in the Chairman's February 26, 1985 letter proved to be somewhat fruitless, as had been anticipated. Over fifty-one Federal Aid Highway recipients were contacted by letter requesting specific data on Hispanic Business Enterprises participation. As of April 5, 1985, 24 States have responded. Their responses have been attached for the record. In addition, the U.S. Department of Transportation was contacted, more specifically, the Federal Highway Administration and the Urban Mass Transportation Administration.

The Federal Highway Administration (FHWA) provided statistical data for all its Federal Aid recipients for years FY 1983 and 1984. In most cases the statistical data provided by the FHWA did not agree with the data provided by the Federal Aid Highway Recipients. This in it self raises serious concern over the accuracy of each's data.

BEST COPY AVAILABLE

The Urban Mass Transportation Administration did not provide any data. They informed us that they did not maintain any grantee contract data in Washington, D.C. Any information relating to Grantee contracting activity would need to be obtained from each UMTA Regional Office or directly from each Grantee. Recognizing the monumental effort of contacting each Grantee, we limited our request to the largest UMTA Grantee in each UMTA Federal Region. Data from these Grantees was not available.

In reviewing the three major areas confronting Hispanic enterprises and impacting their level of participation, NHACE concentrated on the following Federal Aid Highway Recipient: Florida

## Certification

Without a uniform certification process adopted by all DOT recipients of Federal financial assistance, the certification of Hispanic enterprises will continue to be based on the "subjectivity" of an individual or committee who knows little if anything on what constitutes being Hispanic. We are familiar with particular cases in Florida (see attachment) which prove to be frustrating to the legitimate prime HBE's trying to do business in their particular area of expertise and not in the one they are "designated" by the certifying authorities.

Does the certification process adequately identify bonafide Hispanic DBEs?

NO!!

## Technical, Financial and Other Supportive Services

Of the fifty-four Federal Aid Highway Recipients who could have Supportive Services Contractors, only eight have Hispanic enterprises providing services.

## Supportive Services Contractors

The following is a list of Hispanic Supportive Services Contractors:

1. New York - Burgos & Associates
2. Texas - Ser-Jobs for Progress
3. South Dakota - Steve Gomez
4. Arizona - Applied Business Concepts
5. California - Century Freeway Tech Associates
6. Nevada - New Ventures, Inc.
7. Washington State - MID Columbia Consulting
8. New Jersey - Resource Development, Inc.

NHACE has been informed by its member that the services provided by Supportive Services Contractors are generally limited and steer Hispanic enterprises towards subcontracting even if they are proven prime contractors.

Through the efforts of the U.S. Department of Transportation some technical, financial and bonding assistance is made available. However, due to the limited resources available for these services, the process of qualifying for these services is a barrier in itself.

## Recruiting

Most recruiting of Hispanic enterprises is in construction. NHACE can safely say that from FY 1982 through 1st quarter of FY 1985, preconstruction awards were virtually non-existant (92). Through the 1st quarter of FY 1985, those Federal Aid Highway Recipients submitting data to NHACE indicated that there were 92 pre-construction awards compared to 2,208 construction awards. Information on the type of pre-construction work was not available.

## Restrictions

NHACE has identified the following problems that restrict Hispanic enterprises from participating in the program to the extent warrented by their population and capability.

1. Inability to get certified as Hispanic or Disadvantaged. It is preconceived notion that all Hispanics must have a dark complexion speak "broken English" and be barely making it. If you are not, then you can't possibly be a disadvantaged Hispanic.

2. Inability to compete as sub or prime. If you're fortunate enough to be asked for a quote, then you subject yourself to "bid shopping" by the prime. Recipients are not monitoring the prime's activity as it relates to who was submitted as a sub and who ultimately is the sub. This has created the "double" list of contracts awarded via commitments versus the actual dollar expenditures by the grantees.

## New Hispanic Firms

NHACE is unable to determine whether these are new firms but we can say that under this program 1,618 Hispanic firms have been certified. This is interesting in that the U.S. Bureau of the Census estimates there are approximately 27,000 Hispanic construction related businesses in the United States.

## Total Dollars to Hispanic Enterprises

The attached table illustrates awards to Hispanic enterprises for FY 1982-1985. Since statistical data on contract awards was not collected prior to the STAA of 1982 and ethnic breakdowns was not collected by the U.S. Department of Transportation, it is impossible to really estimate the true impact this program has had on Hispanic enterprises.

NHRACE does not profess to have answers to all the problems faced by Federal Aid Highway Recipients or UMTA Grantees. We do however believe that if these entities used "good faith" efforts in utilizing our services and those of our constituents, hearings such as these would become a thing of the past.

NHRACE intends to continue gathering facts and data regarding the impact to this program on Hispanic enterprises regardless of the reluctance of some Federal and State official to cooperate.

Mr. Chairman and Committee members. I thank you for this opportunity.

## NATIONAL HISPANIC ASSOCIATION OF CONSTRUCTION ENTERPRISES

## HISPANIC BUSINESS ENTERPRISES CONTRACT AWARD DATA

FY 1982 - 1985

| STATE | # HBEs Certified | $ to HBEs | # Contacts to HBEs | Total $ Awarded | Total # Contracts | # Const. Awards | # Pre-Const. Awards |
|---|---|---|---|---|---|---|---|
| ALABAMA | | | | | | | |
| ALASKA | | | | | | | |
| ARIZONA | 84 | 26,546,000 | 217 | 419,831,000 | 283 | 217 | 17 |
| ARKANSAS | 14 | 1,130,000 | 20 | 389,496,000 | 467 | | |
| CALIFORNIA | | | | | | | |
| COLORADO | | | | | | | |
| CONNECTICUT | No Data | | | | | | |
| DELAWARE | | | | | | | |
| D.C. | | | | | | | |
| FLORIDA | 138 | 23,865,000 | 148 | 637,900,000 | | | |
| GEORGIA | | | | | | | |
| HAWAII | 14 | | | | | | |
| IDAHO | | | | | | | |
| ILLINOIS | 65 | 4,526,602 | 80 | 192,090,137 | 235 | 70 | 2 |
| INDIANA | | | | | | | |
| IOWA | | | | | | | |
| KANSAS | 48 | 2,902,000 | 96 | 469,516,000 | 910 | | |

FY 1982 - 1985

| STATE | # MBEs Certified | $ to MBEs | # Contacts to MBEs | Total $ Awarded | Total # Contracts | # Const. Awards | # Pre-Const. Awards |
|---|---|---|---|---|---|---|---|
| KENTUCKY | 20 | 2,543,000 | 38 | 56,197,000 | 430 | 35 | 3 |
| LOUISIANA | | | | | | | |
| MAINE | 8 | 2,291,000 | 38 | 163,183,000 | 246 | 38 | |
| MARYLAND | 62 | 2,310,091 | 47 | 593,309,280 | 679 | | |
| MASSACHUSETTS | | | | - | | | |
| MICHIGAN | 96 | 31,900,000 | 92 | 929,000,000 | | | |
| MINNESOTA | | | | | | | |
| MISSISSIPPI | 6 | 2,016,000 | | 26,405,841 | 384 | 79 | |
| MISSOURI | | | | | | | |
| MONTANA | | | | | | | |
| NEBRASKA | | | | | | | |
| NEVADA | | | | | | | |
| NEW HAMPSHIRE | | | | | | | |
| NEW JERSEY | | | | | | | |
| NEW MEXICO | | | | | | | |
| NEW YORK | | | | | | | |
| NORTH CAROLINA | 3 | | | 946,000,000 | 2776 | | |
| NORTH DAKOTA | 8 | 208,000 | 4 | 229,582,000 | 345 | | |
| OKLAHOMA | 20 | 191,000 | | 282,018,000 | | | |
| OHIO | | | | | | | |

FY 1982 - 1985

| STATE | # DBEs Certified | $ to DBEs | # Contacts to DBEs | Total $ Awarded | Total # Contracts | # Const. Awards | # Pre-Const. Awards |
|---|---|---|---|---|---|---|---|
| OREGON | 178 | 15,664,000 | 164 | 496,529,000 | 567 | | |
| PENNSYLVANIA | 36 | 199,207625 | 1087 | 1,227,703,999 | 870 | 1087 | 9 |
| RHODE ISLAND | | | | | | | |
| SOUTH CAROLINA | 12 | 1,828,000 | 8 | 24,845,000 | 546 | 5 | 3 |
| SOUTH DAKOTA | 20 | 1,674,000 | 24 | 195,489,000 | 322 | 24 | |
| TENNESSESSE | 18 | 3,709,000 | 55 | 71,704,000 | 254 | 47 | 8 |
| TEXAS | 729 | 121,224000 | 598 | 2,879,362,000 | 2139 | 590 | 50 |
| UTAH | | | | | | | |
| VERMONT | | | | | | | |
| VIRGINIA | | 2,956,815 | 2 | 145,122,307 | 75 | | |
| WASHINGTON | | | | | | | |
| WEST VIRGINIA | | | | | | | |
| WISCONSIN | 28 | 6,739,000 | 198 | 707,351,000 | 1075 | | |
| WYOMING | | | | | | | |
| VIRGIN ISLANDS | | | | | | | |
| PUERTO RICO | | | | | | | |
| TOTAL | 1,618 | 459,279000 | 3,003 | 11,510,814000 | 13,141 | 2,208 | 92 |

ARTBA
American Road & Transportation Builders Association

# STATEMENT

by the

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION

to the

SUBCOMMITTEE ON TRANSPORTATION

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

## Disadvantaged Business Enterprise (DBE) Program

Presented by: Robert E. Hirschman
ARTBA Immediate Past Chairman
York, Pennsylvania

Accompanied by: Daniel J. Hanson, Sr.
ARTBA President
Washington, D.C.

Cordell Parvin
Attorney-at-Law
Roanoke, Virginia

First Session
99th Congress

Tuesday, November 19, 1985

---

525 School Street, S.W., Washington, D.C. 20024 • (202) 488-2722

Mr. Chairman and members of the Subcommittee, I am Robert E. Hirschman of York, Pennsylvania, a highway and specialty contractor and immediate past chairman of the American Road & Transportation Builders Association. I am accompanied by ARTBA President Daniel J. Hanson, Sr. and Cordell Parvin, Attorney-at-Law.

ARTBA is a national association of more than 4600 business firms and individuals concerned with all aspects of the transportation construction industry. Our members include transportation contractors, public officials at all levels of government, equipment manufacturers, material producers and suppliers, traffic safety industry firms, planning and design organizations and transportation engineering educators.

The members of ARTBA are more concerned about the Disadvantaged Business Enterprise program authorized by section 105(f) of the Surface Transportation Assistance Act of 1982 than any other provision of the Federal-aid highway program. At the very beginning ARTBA questioned the availability of sufficient qualified DBE firms to meet the established goal in the Act of ten percent. Information available to ARTBA and subsequently confirmed in a survey of contractor members indicated that the real availability in 1982 was only two to three percent. In the highway construction business a successful contractor is not made overnight.

Nearly 100 percent of highway construction firms are family owned and operated that have started small and grown. This requires capital investment, personal liability and expertise in construction gained only through many years of experience in specifications, financing, job operation and performance. This is demanded by public agencies and requires bonding. Bonding companies will not even consider a Bond unless these items are provided to their satisfaction. To expect DBE's that do not exist to perform 10 percent of the work under the foregoing requirements is ludicrous and emphasizes the lack of understanding of the highway construction business by the Congress in passing Section 105(f).

With the rigidity built into the Federal Highway Administration regulations to implement the DBE program, some contractors were forced to resort to questionable business practices in order to meet the DBE goal to receive a contract award with state highway/transportation agencies in order to pursue their livelihood. When a contractor may be declared a non-responsive bidder for failing to achieve the 10 percent goal, he may enter into arrangements with people he knows are not legitimate DBEs.

Over the past three years of this program the numbers prepared by FHWA may look good. If we look behind these numbers, however, we will see that many fronts and shams have been created so that projects advertised could be awarded and placed under contract.

Let me cite an example of how this program has fostered unsavory activity. During a recent letting of highway projects, landscaping work was an item on twelve projects. One ARTBA member firm, a non-minority specialty contractor, provided quotes to several prime contractors submitting bids on the work. He was not awarded work on any of the projects. The following day a black minister approached the non-minority subcontractor and asked him to perform the work on the eight jobs for which this DBE firm controlled by the minister had been listed as the landscaping subcontractor.

This is only one example. Personally as a specialty contractor, I would like to bring to the Subcommittee's attention the serious effects that this 10 percent subcontracting goal for DBEs is having on the highway construction industry. Specialty contractors that have been in business for many years are rapidly being forced out of business since the free enterprise system and the lowest competitive bid no longer exists as it applies to highway subcontracting. A non-minority specialty contractor can no longer stay in business, because no matter what his price may be, he is told by the prime contractor that the job must be given to a DBE subcontractor in order to fulfill the predetermined artificial quota.

Mr. Chairman, I would like to enter for the record numerous letters from prime contractors to subcontractors to verify this statement.

The transportation construction industry is deeply concerned. Section 105(f) has placed an unreasonable burden on the prime contractor. The burden of finding qualified and willing DBE subcontractors for the job falls entirely on the prime contractor. The successful bidder must achieve an arbitrary percentage DBE participation which was established without the involvement of the contracting community. Contractors question whether the states have carefully reviewed DBE availability and the opportunity for subcontracting when establishing the goals for various projects. Without proper prequalification procedures how could state highway agencies know the work load capability of DBE subcontractors.

The highway construction industry, as it has evolved over the years, has developed certain well-established practices for doing business. Because of the high cost of equipment and need for expertise in heavy highway construction, most prime contractors have chosen to do most of the work themselves. Historically, highway construction has developed subcontracting opportunities of between 10 and 15 percent for most types of work. This leaves very little room for the non-disadvantaged when 10 percent of all highway work is being given to the DBE group.

A survey conducted by ARTBA's Contractors Division earlier this year confirmed the fact that prime contractors do indeed perform between 85 and 90 percent of highway work even in today's marketplace. One additional and very important fact came out of this survey. The cost of work performed has increased under the DBE goal system. Quotes for work by disadvantaged business firms submitted to prime contractors average approximately 10.7 percent more for the work. This is directly counter to the competitive marketplace established for the Federal-aid highway program. The DBE program has by its very nature encouraged moving away from the lowest bid for a project. If a contractor must achieve a certain percentage of DBE participation, he most often must ignore a lower quote submitted by a subcontractor classified as non-disadvantaged.

The regulations developed to implement the DBE program provided for a "good faith efforts" test with respect to meeting goals established for projects. Many states have been reluctant to look carefully at a contractor's "good faith efforts" to meet the goal. The information required by other states to prove "good faith efforts" is voluminous and expensive to gather. The contractor is often frustrated in attempting to use this test since state highway agencies rarely truly implemented this procedure.

ARTBA and its contractor members support the objective of achieving the opportunity for minority or disadvantaged firms to compete in the free enterprise system of bidding for federal-aid highway work. They, however, do not believe in set-asides, quotas or similar artificially used devices to gain minority participation in highway program. This toying with the free enterprise system has not worked in other countries and it will not work here.

The operation of the Section 105(f) program has in essence become a "quota" in most states. It has had a chilling effect on the highway contractor, particularly the specialty contractor. Since it is not always easy to divide some projects, subcontracting opportunities are somewhat limited. Quite often the specialty area is used to satisfy the goal because of the nature of the work. When a highway contractor bids a job, he will look to the easiest area to meet his DBE goal — the specialty area of highway work. The burden placed on the prime contractor to meet the "quota" is as untolerable as the loss of work being experienced by the specialty contractors.

ARTBA strongly oppose the continuation of the existing Section 105(f) program because:

- prime contractors normally subcontract between 10 and 15 percent of highway work on most projects;
- work costs more when this DBE "quota" system is used, approximately 10.7 percent higher; and
- true availability of DBEs is currently only in the four to five percent range.

Another example of the problem contractors are facing is a recent situation in the State of Tennessee. An asphalt paving contractor bid on two projects which had been advertised by the state highway agency. He failed to achieve the DBE goal on both projects citing his "good faith efforts" in his bid submittal. Yet he was awarded one job and declared a non-responsive bidder on the other. The even application of the "good faith efforts" test in this situation was obviously absent.

Mr. Chairman, two last points must be made clear about the affect of the DBE language in the highway program. First, I stated earlier in my testimony, specialty contractors are having the most difficulty coping with the statute. In recent months two specialty contractors have sold at auctions most of their equipment to generate additional revenue to remain in business or as preparation for bankruptcy. Secondly, long as the DBE program remains the law of the land, illegal or unsavory activity can be expected to continue as contractors attempt to do business in highway work and related construction areas. May we again emphasize that legitimate DBEs do not exist to perform 10 percent of the highway work.

ARTBA strongly recommends not including DBE program as part of the highway reauthorization bill which must be enacted by this the 99th Congress next year. ARTBA does support:

- training programs;
- assistance in meeting bonding requirements;
- help with financial matters for DBE firms; and
- prequalification for subcontractors by the state highway/transportation agencies.

The highway contracting business cannot be learned overnight and longer term assistance is obviously necessary. All one has to do is talk to contractors about the number of DBE failures to perform work or defaults during the job to know that people cannot simply be thrust into the contracting business by a federally mandated program.

ARTBA urges this Subcommittee to give careful consideration to the DBE program and all of its ramifications for the transportation construction industry. The Subcommittee should immediately address itself to a study of the solution for properly administering a program that will foster minority participation, to the extent practical, and protect the free enterprise system for the construction industry.

Thank you for calling this very important hearing today and the opportunity to appear on behalf of ARTBA. If you have questions, we will be more than happy to respond.

* * *

ARTBA
American Road & Transportation Builders Association

RESOLUTION # 3

WHEREAS the Federally mandated DBE program has caused great hardship to prime contractors who cannot reasonably fulfill their contract obligations and to non-DBE firms who have been denied the opportunity to compete for and participate in subcontract opportunities; and

WHEREAS this has resulted in impossibility of performance, resorting to questionable business practices to achieve compliance, and frustration of the competitive bidding system; and

WHEREAS the implementation of the DBE program has placed a great burden on the highway contractors of this nation for finding adequate DBE firms to satisfy the project goals; and

WHEREAS a mechanism needs to be developed for determining the availability of qualified DBE firms if this program is to be continued;

NOW THEREFORE BE IT RESOLVED by the American Road & Transportation Builders Association that the association recommends elimination of the present program which has failed to operate as the goal system contemplated when it was enacted;

AND BE IT FURTHER RESOLVED that it is the position of this association that any new or reauthorized program should direct the establishment of a prequalification system for certifying DBE contractors and A/E firms. Such prequalification system developed by the state highway agency, shall require evidence of the DBE applicant's workload capacity based on factors such as size of work force, equipment, materials inventory, construction/engineering experience, financing, etc. The prequalification process shall also include a means for calculating the financial capacity of such firms to undertake Federal-aid highway work and shall be used to assess the volume of work that can be reasonably undertaken by the DBE business community. This in turn shall be used as the primary basis for establishing DBE program goals for the state's annual submission to FHWA.

AND BE IT FURTHER RESOLVED that such prequalification system elicit the capacity of the DBE business community to undertake specific types of work prevalent in road construction (i.e., excavation, paving, guardrail, painting, electrical, landscaping, surveying, engineering design, etc.). Goals for each contract then shall be established which are consistent with the amount of work that can reasonably be subcontracted by the state's prime contractor and be successfully performed by the segment of the DBE community doing such work.

(over)

Resolution # 3 — continued

AND BE IT FURTHER RESOLVED that when such prequalification and certification listing is published by the states and accepted by the Federal Highway Administration, a prime contractor who utilizes any such listed DBE firm would be permitted to complete the work with its own forces or any sub-contract forces at the election of the prime contractor if the selected DBE fails to perform

AND BE IT FURTHER RESOLVED that the use of a DBE firm from a prequalified and certified list shall be prima facie evidence that the work of the DBE will count toward the goal for the project and the contractor shall in no way be held responsible if FHWA, a state highway agency or a court determines that the selected DBE firm was not eligible for participation in the DBE program.

Hershey, Pennsylvania
July 17, 1985

**ASSOCIATED GENERAL CONTRACTORS OF AMERICA**
NEW YORK STATE CHAPTER, INC.

CHAPTER OFFICE
[illegible]
WESTERN REGIONAL OFFICE
[illegible]
OFFICERS
[illegible]
DIRECTORS
[illegible]

November 4, 1985

Commissioner Franklin White
New York State Department of Transportation
5 Governor Harriman State Campus
Albany, New York 12232

Dear Commissioner White:

Re: Affirmative Action Directives

In April of this year, we were assured that "the comments that we [D.O.T.] have received will not fall on deaf ears." On October 24, the AGC, along with other Industry representatives, attended the Affirmative Action Advisory Council meeting in New York City. It seems to be fairly evident that all significant Industry comments fell on deaf ears as the TAAPO Task Force rejected all Industry objections as not having enough merit to persuade TAAPO to modify its draft directives on Affirmative Action and Equal Employment Opportunity issues.

We, along with other Industry representatives, have had a number of opportunities to discuss these directives with Department representatives--not one accommodation appears to have been made. The course the Department is pursuing eventually ends in "throwing the baby out with the bath water." It is our opinion that the competitive bidding statutes, its intent and safeguards, is being eroded by administrative fiat. We need not repeat the litany of objections to these D.O.T. directives, except to say that the 95% "guideline" will only end up costing the taxpayer more money. Flexible guidelines turn into rigid rules as easily as goals turn into quotas when people try to right all the Industry ills, both real and imagined.

To suggest we artifically establish a percentage range as a substitute for the lowest price, benefits neither the taxpayer, nor the MBE, nor the prime contractor, and will, like so many other ill-conceived ideas, ultimately lead to abuses greater than the one we now seek to cure.

We have nothing against the cultivation and encouragement of minorities into the mainstream of the Industry, but not at the expense of the stability of the competitive bidding process. We must, therefore, continue to insist that the only reasonable price is the low price. Indeed, we agree with the former Secretary to the Governor, Michael Del Guidice's characterization of the competitive bidding process. "Be assured that this Administration is committed to the idea that competitive bidding is the system which best meets the needs of this State with respect to public works construction. It is this system which, when operating properly, produces the lowest price while, at the same time, guarding against the possibilities of favoritism and corruption."

We have not been able to discover any statutory authority which allows the Department to deviate from existing law, and must react to these directives as a serious threat to the Industry's well being and proceed accordingly.

We are writing to you now in the hope that our concerns will not fall on deaf ears.

Sincerely,

AJ Castelbuono
Executive Vice President

AJC:ll
cc Mr. Charles Carlson
Mr. Howard Sheffey
AGC Board of Directors
Affirmative Action Committee

ASSOCIATED GENERAL CONTRACTORS OF AMERICA
NEW YORK STATE CHAPTER, INC.

CHAPTER OFFICE
1180 Western Avenue
Albany, New York 12203-[illegible]
Telephone: (518) 456-1134
1-800-342-[illegible]
[illegible], Exec. Vice President

WESTERN REGIONAL OFFICE
3502 Southwestern Boulevard
Orchard Park, New York 14127
Telephone: (716) [illegible]

OFFICERS
Eugene B. Hallock, Jr., President
Hudson River Construction Co., Inc.
James H. [illegible], 1st Vice Pres.
[illegible] Construction Co., Inc.
Edward J. Petrillo, Jr., 2nd Vice Pres.
Yonkers Contracting Co., Inc.
Eugene B. Hallock, III, Sec.-Treas.
Hudson River Construction Co., Inc.
Patrick W. Reardon, Ass't. Treas.
Suffolk Highway Products, Inc.

DIRECTORS
Herbert F. Darling, Jr., Imm. Past Pres.
Herbert F. Darling, Inc.
Charles B. [illegible], Region 1
I. & O. A. Slutzky, Inc.
Joseph [illegible], Region 2
Barrett Paving Materials, Inc.
David R. [illegible], Region 3
S. J. Groves & Sons Company
[illegible], Region 4
[illegible] Construction Co., Inc.
James F. May, Region 5
[illegible] Construction, Inc.
James J. [illegible], Region 6
J. J. [illegible], Inc.
Hugh Schickel, Region 7
H. Schickel General Contracting, Inc.
Frank [illegible], Region 8
Yonkers Contracting Co., Inc.
Martin A. [illegible], Region 9
Lancaster Development, Inc.
Edward B. Fitzpatrick, Jr., Region 10
Clark-Fitzpatrick, Inc.
Gary L. Rost, Utility
E.E. Rost & Sons, Inc.
Eugene P. Harvey, Subcontractor
[illegible], Inc.
Joseph C. Perreault, Associate
Watson Bowman & Acme Corp.
*[illegible] F. [illegible]
[illegible] Construction Corp.
*John J. Baro, Jr.
Baro Construction, Div. of [illegible]
Harold S. Bixby
Tri-City Aggregates, Inc.
[illegible] E. Burns
Tuscarora Construction Co., Inc.
Edmund V. Caplicki, Jr.
John Arborio, Inc.
*Thomas A. D'Angelo
Triple Cities Construction Co., Inc.
[illegible]
Elderlee, Inc.
*Richard E. [illegible]
Cold Spring Construction Co.
Richard E. Garman
ABC Paving Company, Inc.
Milton A. Hendrickson
Hendrickson Bros., Inc.
*Richard C. Holmes
Holmes & Murphy, Inc.
Joseph C. Arborio (Honorary)
John Arborio, Inc.
Peter Arborio (Honorary)
John Arborio, Inc.
Frank B. [illegible], Jr. (Honorary)
County Asphalt, Inc.

*National Directors

November 4, 1985

Mr. Michael Kennedy, Director
Equal Opportunity Services
Associated General Contractors of America
1957 East Street, N.W.
Washington, D.C. 20006

Dear Mr. Kennedy:

For several months the Construction Industry in New York has had several meetings with the New York State Department of Transportation over several affirmative action directives which the D.O.T. intends to implement over our objections.

We have been told by the FHWA's regional office that the following directive is not being objected to by FHWA. This past year FHWA supported our position against the negotiations by N.Y.S. D.O.T. of prime contracts in contravention of public bidding statutes. However, FHWA now seems to see nothing wrong with negotiation of subcontracts based on the following N.Y.S. D.O.T. directive:

> "The following criteria will govern selection or rejection of a D/WBE in conjunction with good faith efforts towards goal attainment, where 'reasonable price' alone is the issue:
>
> When all or a portion of the contract quantity for a specific contract item of work is proposed to be subcontracted to a D/WBE:
>
> (1) If the D/WBE quotation is equal to or less than 95% of the unit bid price for the contract item, such quotation shall be considered to be a "reasonable price" regardless of what other proposed subcontractors may have quoted.
>
> (2) If the D/WBE quotation exceeds 95% of the unit bid price the D/WBE quotation shall be considered reasonable if it does not exceed 10% of the lowest of

> all quotations received from other prospective subcontractors, provided the conditions of the proposed subcontractors are equal."

The New York State Chapter, AGC sees this directive as further exasperation of an already bad situation, namely majority specialty subcontractors going out of business. Our position is that the only reasonable price is the low price.

We need your help. We need to know if the regional FHWA's position is the same as Mr. Barnhardt's. We also need to know what, if anything, National AGC can do to help us end such a proposed practice.

Sincerely,

AJ Castelbuono

AJ Castelbuono
Executive Vice President

AJC:ll

cc: Board of Directors

BEST COPY AVAILABLE

WRBA
Wisconsin Road Builders Assn.
44 E. MIFFLIN ST., SUITE 401, MADISON, WISCONSIN 53703 • TEL. 608/256-6891

PRESIDENT
MARLEE SLIFKA
Black River Falls

VICE-PRESIDENT
JAMES BONNESS
Brookfield

SECRETARY
RICHARD MANN
Elkhorn

TREASURER
LARRY BURCALOW
Waunakee

DIRECTORS:
THOMAS AMON
JAMES A. BONNESS
LARRY BURCALOW
RICHARD JAMES
DONALD P. KAISER
WILLIAM KENNEDY
RICHARD MANN
RALPH MORELLO
KENNETH PAGEL
GERALD RAEMISCH
TERRY RICHARD
MARLEE SLIFKA
HENRY TIMMC
R. L. VINTON

RAY DROTT
Ex-Officio

EXECUTIVE
DIRECTOR
HARRY A. LINDBERG

FIELD ENGINEER
DALE L. FENLEY

November 1, 1985

The Honorable Jim Moody
U.S. House of Representative
1721 Longworth Bldg.
Washington, D.C. 20515

Dear Congressman Moody:

Thank you for your letter of September 30, 1985.

It is really a shock to our members that one of our congressional delegation would be supportive of a bill which in your own words is discriminatory to non minorities. I quote from your letter. "I will say, however, that discriminiation against non-minority contractors-specialty or otherwise - is exactly what was intended by this provision." This position is contrary to the Constitution and everything that this country stands for. Your position virtually wipes out any chance of support from this industry in the event you should decide to run for the U.S. Senate or any elected position.

You did ask for us to send you information on the type of problems being encountered. Enclosed is a copy of an October 15 letter from one of our members - James Cape & Sons of Racine - which describes the sort of problems that are confronting the industry.

Sincerely,
H A Lindberg
H. A. Lindberg,
Executive Director

HAL:pjt
Enc:
lcc: Jim Wimmer with enclosures
lcc: Bill Cape

Racine (414) 639-2552
Milwaukee (414) 342-3585

Post Office Address
Box 1315

JAMES CAPE & SONS CO. *Highway and Street Construction Contractors*

6422 North Highway 31 • Racine, Wisconsin 53401-1315

October 15, 1985

Mr. Harry Lindberg
Executive Director
Wisconsin Road Builders Association
44 East Mifflin Street, Suite 401
Madison, WI 53703

SUBJECT: DBE/WBE Program

Dear Harry:

In reference to the DBE issues and the program, I am outlining several examples typical of existing DBE contractors:

Dionne Corporation, owned by Walter Ward, Traffic Control Services

Project 2362-02-70; East North Street, Waukesha County; Contract Amount $75,465.75; Subcontract Amount $2,200.00; DBE/WBE Percentage Goals, 15/5%

We notified Dionne Corporation to begin work after award of contract. On April 30, 1985, Mr. Walter Ward requested from Bill Cape a $200.00 loan because he did not have enough money to purchase batteries required to run the flashing lights on the barricades. A check was issued to him. On May 3, 1985, Mr. Ward contacted Bob Cape for the same purpose. A second check was not issued. He placed the barricades on the project. Mr. Ward was unable to fill out the required certified payroll reports and he came into our office for assistance. Each subsequent payment involved frequent reminders to submit these reports and again assisting him in filling out the forms. Upon completion of the work we called him to have his barricades removed from the project site, we received no answer and our calls were never returned when messages were left with answering service. Our superintendent called mornings, afternoons, and evenings with no reply. A certified letter (see enclosed copy) was returned unclaimed. The barricades were picked up approximately three (3) weeks later after we had removed and piled them off site. This company quotes us on work worth several hundred thousand dollars. Dionne Corporation was totally incompetent on this relatively small job which was close to their home.

"An Equal Employment Opportunity Employer"

Cain's Trucking, owned by Larry Cain, Trucking Services

Project 3310-01-70 M 6202(4), East Wisconsin Avenue; 3030-00-70 M6202(3), South Main Street, Waukesha County; Contract Amount $640,332.19; Subcontract Amount $97,570.50; DBE/WBE Goals, 10/5%

On a project that ran for four (4) months, Cain's superintendent was on the job three (3) times. At Mr. Cain's request, we advanced him $3,000.00 to keep the construction going and to pay his subs. We received phone calls from his subs requesting payment because he had not paid them. The first pay estimate was made out to Cain and one of his subs, Bruckner Excavation. Cain had Bruckner endorse the check, cashed it and left town for a week without paying Bruckner. From that date forward (approximately three (3) weeks after starting this project), Cain's personnel were not on the job at all. WDOT personnel and our staff called his office daily and rarely received a response. We attempted to have WDOT, District 2, Minority Business Enterprise people help to motivate Cain's Trucking but they were as frustrated as we. In addition, Cain and Bruckner had to be instructed as to how to fill out the necessary state forms continually. We continued making two party checks to insure Cain's subs of being paid. Currently, Bruckner is requesting additional money because he alleges Cain's Trucking performed none of the work on the project. It was all done by Bruckner which is a non-minority firm. Our office received a call last week from a disgruntled trucker claiming Cain had never paid him and has filed a $7,000.00 claim. I would estimate our office staff and supervision has put in well over 200 hours trying to help and sort out Cain's Trucking. This is another company certified by WDOT and has quoted on jobs in excess of $500,000.00. We have spent many, many hours trying to work with them and all for nothing. The resident engineer for this project was as patient with Cain's as I have ever seen. I really feel they should not be in the contracting business.

Saxa, Inc., owned by Paul Kimmes, Grading Services

Project 1381-01-72 M5700(8); 1381-01-72, Mequon Road, Milwaukee County; Contract Amount $3,335,446.09; Subcontract Amount $304,798.50; DBE/WBE Goals 12% combined

Saxa was certifed as a DBE in 1983. They were used on the Mequon Road WDOT project. Their performance was about average for the summer of 1983; however, they simply failed to complete their work in the spring of 1984. Our staff worked with them to assist and them them in filling out state forms, they were paid in advance to our receiving payments from the state, and currently we have unpaid bills of:

| | |
|---|---|
| Unpaid supplies and equipment rental | $ 25,000.00 |
| IRS tax levy | 25,000.00 |
| Job lien for union fringe benefits | 6,300.00 |
| Equipment rental Stoehr Grading | 156,000.00 |
| Total bills we are aware of: | $212,300.00 |

Our company has retained an attorney to sort this out. The WDOT has decertified Saxa and, therefore, will not help to collect or try to make things right. Normally, we would not have used this firm since they were inexperienced but in order to meet the required DBE goals, and they had been certified with WDOT, we used them. We understand the principals have moved their operation to Michigan and are working as a new minority company.

BG Enterprises, owned by Bess Gagliano, Marking and Striping Services

Project 1065-05-71 IR 94-3(111)292, Madison-Milwaukee Road (Goerkes Corner), Waukesha County; Contract Amount $5,148,880.73; Subcontract Amount $134,038.00; DBE/WBE goals 11/4%

BG tries hard but is always in trouble. On a project in 1984, their epoxy striping failed and held up acceptance and final payment until August 1985. We have been delayed six (6) times on this project by BG. We have advanced payment the entire run of the project. We purchased $24,000 worth of paint for them because they were unable to get credit. This is a crucial project, time of the essence and regularly they hold us up.

Eaton's Asphalt Service, Inc., owned by Leo Eaton, Asphalt Pavement

Project 1032-05-70-71 IR 94-69(52)336, Illinois State Line/Milwaukee, I-94;

In 1983 this DBE contractor renigged on a verbal telephone quotation. Since 95 percent of our work is done with verbal quotes, integrity is absolutely necessary to function in WDOT work. We used Eaton's low quote in our bid. We were low bidder, we notified him of our intent to subcontract with him and he refused at the original quotation, however, did say he would subcontract at a price of $100.00 per ton higher(the original quote was $35.00/Ton on 270 tons). We requested help from WDOT and they refused (see enclosure). We are required by law to use inexperienced and unethical businesses, then are faced with the financial burden when they back out.

I have briefly outlined only a few examples of failure. We can elaborate on many more. In addition to the cost of delays, legal fees, lawsuits, etc., we have supportive and administrative costs in excess of $200,000.00 per year. Most of our work is for the WDOT and these costs are reflected in our future bids. I cannot begin to describe how inadequately DBE/WBE's are prepared to enter this business.

I sincerely hope a hearing will be set up so the rest of the industry is heard.

Sincerely,

William R. Cape

William R. Cape
Vice President

WRC:jal
Enclosures

cc: Senator William Proxmire
Senator Robert Kasten
Representative Jim Moody
Representative Thomas Petri
Representative Gerald Kleczka

# ELDERLEE, INC.

Erectors of Highway Guide Railing
Oaks Corners, N. Y. 14518
Phone: (315) 789-6670

October 15, 1985

Mr. Robert Jerrett, III
Abt Associates Inc.
55 Wheeler Street
Cambridge, Mass. 02138

Dear Mr. Jerrett:

Reference your letter of September 4, 1985 requesting information relative to the impact of the D/WBE requirement on specialty subcontracting firms such as ours.

Elderlee, Inc. specializes in the manufacture and installation of highway guide railing, bridge railing and traffic signs. Due to the nature of our work, we are usually one of the last, if not the last, operations to be performed prior to completion of the project. As a result, we did not immediately feel the effect of the D/WBE program because our subcontract backlog can extend over one, two or even three years. Our volume of work began to decline in 1980-81.

The infusion of new federal funds due to the Surface Transportation Assistance Act of 1982, coupled with the New York State Highway Bond Issue passed by referendum in November of 1983, provided an accelerated highway program in New York State to reverse our declining volume.

However, our increase in volume is due to the increase in safety contracts we have been successful in bidding as a PRIME contractor during 1984-85, whereas our subcontract work continues to suffer reverse discrimination and is being eroded.

If the D/WBE requirement is not eliminated, or at least reduced to a managable level in proportion to the available LEGITIMATE D/WBE firms, then the demise of the specialty subcontractor will become a reality following the expiration of the Surface Transportation Act and the New York State Highway Bond Issue funds.

As for myself, I will have reached retirement age by then, but what happens to an organization that has grown for over 50 years? An organization that (a) employs over 14% minorities in its manufacturing plants, (b) employs over 15% minorities when working on the road, and (c) in 1984 employed over 800 people?

Enclosed are 10 letters received from contractors sympathetic to our plight that have written voluntarily to express why Elderlee was not given an opportunity to compete for work.

Also enclosed is our letter to the AGC explaining difficulties in meeting the D/WBE requirements on just one of our jobs. We have many other examples.

In addition, I am enclosing two letters, which may be of interest, from SanCon Construction Co., Inc., a minority firm, illustrating their problems staying alive.

Lastly, I enclose the Spring 1985 Newsletter from the legal firm of Parvin and Wilson, together with Vol. 14, No. 7 and Vol. 15, No. 8A of Cockshaw's Construction Newsletters, all of which realistically review the whole spectrum of the DBE problem as it exists today in much better terms than I could ever express.

Thank you for this opportunity to submit our comments on a subject that has become a cancer engulfing the construction industry.

Very truly yours,

ELDERLEE, INC.

Ernest Demetriades

Ernest Demetriades
Vice President

ED:fv
Enclosures

*A. L. Blades & Sons, Inc.*
GENERAL CONTRACTORS
P. O. BOX 180
WEBB'S CROSSING ROAD
HORNELL, N.Y. 14843
607-324-3636

8 August 1985

New York State
Department of Transportation
Affirmative Action Program Office
1220 Washington Avenue
State Campus Building 5, Room 202
Albany, New York 12232

ATTENTION: Larry Hughes

Re: Steuben Co. D500164

Dear Mr. Hughes:

Enclosed is a revised AAP 19 which reflects increased DBE participation. The revision was caused by our inability to reach Iroquois Portage (DBE) and have them commence their work. We have attempted to reach that firm on numerous occasions, but to no avail. As the trucking requirement is now dwindling, it is doubtful that they will participate in this project. Without their involvement, the DBE participation is virtually nil.

Previously, I had given the guide rail and sign portion of the project to Elderlee, Inc. After discussing the DBE problem with them, they reluctantly agreed to bow out of the contract. Ganflec was then contacted and their commitment was received. (Their letter of intent is enclosed.) It should be noted that this affirmative move on our part will cost us $5,200.00 in premium.

I trust the revised form will meet with your approval, and should you have any questions regarding this matter, please contact me at your earliest convenience.

Respectfully,

James F McGee

James F. McGee
General Manager

JFM/lc

Enc.

XC: Ernie Demetriades

*A. L. Blades & Sons, Inc.*
GENERAL CONTRACTORS
P. O. BOX 190
WEBB'S CROSSING ROAD
HORNELL, N.Y. 14843
607-324-3636

16 May 1984

Elderlee, Inc.
Oaks Corners, NY 14518

ATTENTION: Ernie Demetriades, President

Re: Schuyler - Yates Co. D500016

Dear Mr. Demetriades:

It is with regret that I must write this type of letter for apologies are never easy. Your firm's guide rail and sign quotations for the referenced project was low and responsible. However, due to outside pressures, we were coerced into accepting a higher quotation in order to meet the DBE/WBE "goal." I should add that we used your prices with normal markup going into the bid, and we met with success. Unfortunately, you will not be allowed to share in that success. Moreover, our success is diminished by accepting prices which are 10% higher than "original cost."

It is a peculiar age we live in when government dictates business mores which are contrary to moral law. Social regulations which usurp the economic principles and practices this country was founded upon are doomed for failure. In the meantime though, our firms will suffer. In the end, the ultimate damage will be borne by the very people the regulations were intended to aid. That irony can well be labelled injustice.

Again, we apologize for this current circumstance and hope that our long-standing business relationship will endure.

Respectfully,

James F. McGee
General Manager

JFM/lc

**Cold Spring Construction Company** Incorporated 1911
P.O. BOX 358 · 3 JACKSON STREET · AKRON, NEW YORK 14001 · TELEPHONE 716 542-4581
RICHARD E. FORRESTEL / PRESIDENT

May 18, 1984

Mr. Ernie Demetrades
Elderlee, Inc.
Oaks Corners, NY 14518

Dear Ernie:

I regret to inform you that we are unable to give the Chemung County job D251028 to you. You did have the low quote, but we could think of no other way to meet our MBE goal except to give your specialty work to an MBE firm.

After more than fifty years of working together in this competitive business whenever we had need of your services, I realize that this is a bitter pill for you but so too is it for us.

I hope you realize that it is also a very difficult decision for us. Your work has always been much more than just satisfactory, and many times you have gotten us out of a jam on short notice that was of our own making.

We appreciate all your efforts and this certainly is a terrible way to show it but we had no choice.

In the future I hope that our business relationship will continue. We will try very hard to organize our bids to meet our goals in some other way, but in this case we could find no other way.

It wouldn't be so bad if this DBE program solved a social problem, but in my opinion, it does not. It merely gives preferential treatment to a few at the expense of the tax payers, and with consequential disastrous results to you the subcontractor.

Again I am sorry and I hope it doesn't happen again, but I can't promise it, the current laws and regulations being what they are.

Sincerely,

Richard E. Forrestel
President

REF/sjg

677-3756

**Union Concrete and Construction Corp.**

P O BOX 410
105 CENTER ROAD
WEST SENECA NEW YORK 14224

August 12, 1985

Elderlee Inc.
Cross Rds.
Oaks Corners, NY 14518

Att: Mr. Robert Rook

Re: D251531
County Rd. 64 over Sawyer Creek
Niagara County

Dear Sir:

To meet our MBE goal on the aforementioned project the Bridge Rail and Guide Rail Subcontract will be awarded to an MBE Firm.

Your Firm submitted a very competative bid. This combined with your excellent past performance record verses an unknown made this a difficult decision.

Yours truly;

George C Hill

George C. Hill, President
Union Concrete & Construction Corp.

GCH/jn

ABC PAVING CO., INC.

2544 CLINTON STREET • POST OFFICE BOX 350 • BUFFALO, NEW YORK 14224 • (716) 826-7310

July 24, 1985

Elderlee, Inc.
Oaks Corners, New York 14518

Re: TAS 85-27
Ontario County

Attn: Mr. Robert Rook

Gentlemen:

Thank you for the quotation on the subject project in which we were the apparent low bidder.

Although your quotation was competitive, the contract is being awarded to San Juan Construction & Sales Co., Inc., in an effort to obtain some minority participation on a project with a 10% goal.

Thanks again for the quote.

Very truly yours,

J.S. Lavalso

JSL:bw

*Chemung Contracting Corporation*
**1299 Upper Broadway**
**Post Office Box 284**
**Elmira, New York 14902**

August 13, 1985

Elderlee Inc.
Oaks Corners
New York 14518

Attention: Ernie Demetriades

Re: New York State
Department Of Transportation
Letting June 6, 1985

Gentlemen:

The following is the status of your quotes to us for the following projects.

Chemung Co. - D251457

Your price was the lowest, but we had to give 1/2 of the work to an MBE at a premium to meet our "goals," the other 1/2 we intend to have you do.

Cayuga Co. - D500222

Your price was the lowest, but we had to give all of this work to an MBE at a premium to meet our goals.

It is our policy to award subcontracts to the subcontractor with the lowest responsible quote tendered prior to the bid opening, but because of the requirements placed on us by the NYSDOT it was not possible to do this on these projects.

I hope you understand our situation and continue to quote us in the future.

Very truly yours,

CHEMUNG CONTRACTING CORPORATION

Thomas J. Farmer

Thomas J. Farmer
Chief Estimator

sac

R. C. Billings, Inc.
PAVING CONTRACTOR
320 E. WASHINGTON ST. · BATH, N. Y. 14810 · (607) 776-4121 · (607) 776-3230

June 1, 1984

Elderlee, Inc.
Oaks Corners
New York 14518

Re: D251004 - Yates Co.

Gentlemen:

We regret to inform you that we are unable to use your firm on the above project even though your prices were competetive due to N.Y.S. DOT contract goals which influenced us to use a minority subcontractor at a higher price inorder to meet our contract requirements and obtain a timely award. I hope this causes no hard feelings and that you will continue quoting us in the future also, please feel free to contact us if you have any question pertaining to this matter.

Yours truly,

Michael Billings
Michael Billings
Office Mgr.

MB?bmk

**NORTHERN STATES CONTRACTING COMPANY, INC.**

P.O. Box 258 Buffalo, N.Y. 14224 716-826-3535

*January 7, 1985*

*Mr. Ernest Demetriades*
*Elderlee, Inc.*
*Oaks Corners, New York 14518*

*RE: Contract D500055, Broome County, Guard rail work*

*Gentlemen:*

*This is to thank you for your quotation for guard rail work on the above project.*

*Although your price was competitive, our minority requirements for this contract dictate that we award the work to a minority firm. We have therefore awarded this contract to San Juan Construction & Sales Company, Delmar, New York.*

*We wish to thank you for your courtesy and hope that you will quote us on future projects.*

*Wishing you well for the new year, we remain,*

*Sincerely,*

*Joseph Barillari*
*President*

*JB:ks*

JOHN ARBORIO, INC.
*Road Builders, Contractors*
PHONE (914) 454-3100
*An Equal Opportunity Employer*
P.O. BOX 791
POUGHKEEPSIE, N.Y. 12602-0791

January 22, 1985

Elderlee, Inc.
Cross Road
Oaks Corners, New York 14518

Attn: Mr. Ernest De Metriades
President

Re: D250990 - Sullivan Co.
Route 17

Gentlemen:

We want to thank you for your low bid for the guide rail and sign items for the above referenced project.

Because of our contractual obligation in meeting certain established goals, we were compelled to award the work to a minority subcontractor.

We would appreciate receiving your price quotation for further projects. Thank you again.

Very truly yours,

JOHN ARBORIO, INC.

Anthony J. Zanin, Chief Engr.

AJZ/ch

cc: file

Penn Yan Builders, Inc.

Penn Yan, New York
14527
Office Phone 315/536-2592
P. O. Box 3

RECEIVED
DEP. COMM., DEPTL. OPER.
MAR 15 1985

| | | | |
|---|---|---|---|
| | PUB. | | SEE ME |
| | ENGINEERING | | COMMENTS |
| | OPERATIONS | | RETURN |
| | REG. AFF. | | FILE |
| | REG. DIR., REG. | | |

March 13, 1985

Mr. Charles E. Carlson, P.E.
Deputy Commissioner - Department Operations
New York State Department of Transportation
Building 5, State Campus
1220 Washington Avenue
Albany, New York 12232

Dear Mr. Carlson:

My comments to your directive concerning D/WBE goals are listed below:

Paragraph B, Item 1 a - The prime contractor is being penalized the actual cost of the markup necessary to run the sub's work through his company.

Paragraph B, Item 1 d - This statement increases cost to all of us and decreases productivity drastically. Why rent a "crane" or whatever equipment is necessary and pay for the move to and from the project when the necessary equipment to perform the work is already at the project site? "Let's screw the contractor again" seems to be the philosphy behind this entire directive.

Paragraph C, Item 2 - If this is going to be implemented, then MBE, WBE must bid the work prior to the letting, not after. Face the facts, MBE's and WBE's know they have the sword of Damaculus hanging over a prime's head. Quotes are given after the low bid has been announced. Most of these people don't respond prior to the bid, only after. Where does that put the prime? Right up shit creek! ENOUGH!

I firmly believe in free enterprise and couldn't care less if the low quote is from a MBE, WBE, black, green, orange, red, male, neuter or spayed. If they can do the work, super! If not, give the work to someone who can.

Yours truly,

Richard N. Osgood

Richard N. Osgood, P.E.
President

CC: Governor Cuomo
AGC
Senator Smith
Assemblyman R. Kuhl

RECEIVED
ASST. CO... RS
MAR 19 1985
Rid. t...
Ne...
Inform ...
Prepare Reply F...

xc Moure C
Tom B
Howard S
TIM Fiato

GENERAL CONSTRUCTION · CONCRETE SPECIALS
NEW YORK ROADS · BRIDGES · ETC.

ELDERLEE, INC.
ERECTORS OF HIGHWAY GUIDE RAILING
OAKS CORNERS, N. Y. 14518
Phone: (315) 789-6670

September 24, 1985

Associated General Contractors
New York State Chapter, Inc.
1900 Western Avenue
Albany, NY 12203-5097

Attention Mr. Robert J. Bain, Director
AGC Governmental Affairs

Dear Bob:

Referring to your letter of August 22, 1985 I must apologize for my tardiness in replying for "tis the season" as I'm sure you are aware.

As far as "horror stories" and "difficulties" witn TAAPO, the underlying theme seems to be goal vs quota, accentuated with harrassment and intimidation.

We bid a project in Clinton County which called for 99% of the work to be traffic and guide signs, our specialty. The NYSDOT set a 12% MBE goal and a 2% WBE goal. I had M. S. Artisian Arborists Company, a WBE, give us a price for clearing and grubbing which accounted for 3.1% of the contract amount, however, as all the remaining items were sign specialty items, I was unable to fulfill the MBE goal. I contacted eighteen minority contractors from Regions 1, 2 and 7 whom I thought would have even the remotest possibility of performing any items at all on this project. I received a standard answer, "There is nothing on this job that I can perform". Only a specialty contractor, the very ones that we bid against, could do any of these items.

I inquired of TAAPO if we were expected to give items away to those we bid against. Their reply, "No, but obtain the goal by whatever means possible." I was called day after day by TAAPO, asking what progress we had made, asking if we had called this minority or that one. They expected us to get someone to do something, but they didn't know who and they didn't know what.

Finally, I was contacted by a small minority contractor from Plattsburg, New York explaining that he could give us a price for the overhead sign structure footings. He had never seen one and didn't know what it was, but he could do it $2,000.00 cheaper then we could,and we do these on a reguler basis all year long!

After four phone calls and three mailings, I was able to get him to submit a correctly filled out HC89e and CONR 275c and I finally received unit prices from him after I broke down his lump sum figure into the proper items.

Now comes the day to do the work. He arrived with one laborer, an owner-operator backhoe, a pickup truck and a wheelbarrow. He did not know where to dig, how deep to dig, and would take no measurements. About 10:00 he had "business" to take care of and did not return until 2:00 that afternoon. On top of that, he wanted an advance for insurance, an advance for gasoline, an advance to pay his backhoe operator, and then he wanted to charge the concrete to our account, as he was having a "little trouble" with the ready-mix company.

To add a little icing to this job, the WBE landscaping subcontractor skipped town, never called, and we wound up doing all the clearing and grubbing ourselves. But, both of these minority subcontractors were approved and still are today!

We must look to our legislature for help to combat this most ridiculus social program. I quote Mr. Dick Munn, executive vice president, of the AGC of California. "The entire concept of special preference programs is so illogical and contrary to the overall public interest that their defeat must be this industry's highest priority."

Very truly yours,

Robert M. Rook

RMR:mm

SanCon Construction Co. Inc.
286 Loudonville Road
Loudonville, New York 12211
(518) 462-3760

August 22, 1985

Mr. Howard Goff
Elderlee Inc.
Cross Road
Oaks Corners, New York 14518

Dear Howard:

This letter is being written to you in a conscience effort on our part to make you aware of the situation of SanCon Construction as of today.

We began our small company this spring and hoped that the schedule of projects we were successful in bidding would allow us to perform on one contract at a time. We began D500181 (Ulster/Orange) on June 17, 1985 and intended to finish by the beginning of D251402 (Schenectady/Saratoga). The Clearing and Grubbing in Ulster/Orange was more time consuming than we estimated, then we were shut down for a week, and held back by Genflec, leaving us today with one week remaining on the Tree Removal item and three weeks for Guide Rail Removal on Route 209 to complete our contract.

We have worked in Ulster/Orange over two months and our problem is the delay in New York's system of payment. If you had not granted us early payment on the Clearing and Grubbing we would have, according to Fran in your office, received payment for that item on or about August 23, 1985 as part of the first estimate to the State. Estimate #2 she feels is due for payment in early September and will pay us for Guide Rail Removal work done in July and net us approximately $8,000.00 less retainage of 5%.

The problem, as you can see, is that other than your advance payment to us, SanCon has no income to date and although we have a line of credit with a local bank, we will be borrowed to our maximum of $65,000.00 in two or three weeks if we begin Saratoga/Schenectady at this time and perform both contracts for a five week overlap.

We had-anticipated that once we were into the State's system of payment progress checks would come in on a regular basis and this has not been the situation.

P

For these reasons, the delimma we are in if payment continues as it is now, is that we can not begin Saratoga/Schenectady and guarantee completion in Ulster/Orange or Saratoga/Schenectady.

What we are proposing is the only possible way we feel we could meet the obligations of these two contracts. If we can be paid on the agreed amount of accomplishment at the end of each week by the end of the following week, on both of these projects, I feel confident we can complete both of them in a timely manner and survive our cash-flow problems.

Please give serious consideration to our proposal. If you feel it is not a workable solution, then we must request that we be released from Contract D251402 in Saratoga/Schenectady so that we can guarantee completion on D500181 Ulster/Orange.

I would like to once again thank everyone at Elderlee for their patience and the help they have given us in the first construction season for our new firm.

Sincerely,

Susan

Susan R. Constantine
President

SenCon Construction Co. Inc.
286 Loudonville Road
Loudonville, New York 12211
(518) 462-3760

August 27, 1985

Mr. Howard Goff
Elderlee Inc.
Cross Road
Oaks Corners, New York 14518

Dear Howard:

Attached is an invoice for the contract D500181 (Orange/Ulster) covering everything that SenCon has accomplished as of the close of business on Friday, August 23, 1985. Since you already know our financial condition any payment will be appreciated.

Also, I understand from Jerry Henry, our Foreman on this job, that there is some concern whether we will finish the work on contract D500181. Both you and Ernie can rest assured that we will fulfill our obligations and not leave you in a bind.

Sincerely,

Susan R. Constantine
President

BEST COPY AVAILABLE

SanCon Construction Co. Inc.

Contract D 500181
INVOICE
Through August 23, 1985

| | | | |
|---|---|---|---|
| Clearing and Grubbing | 201.0601 | | $18,000.00 |
| Less Payment | | $10,000.00 | |
| Less Payment | | 5,732.00 | |
| Route 52 | 606.71 | | $1,828.00 |
| | 606.76 | | 375.00 |
| | 606.48 | | 30.52 |
| Route 97 | 606.71 | | $5,536.00 |
| | 606.72 | | 5,687.00 |
| | 606.76 | | 850.00 |
| | 606.62 | | 291.20 |
| | 606.48 | | 170.04 |
| | 614.0352 | | 290.00 |
| Route 209 | 614.0322 | | $ 300.00 |
| | 614.0332 | | 1,020.00 |
| | 614.0342 | | 225.00 |
| | 614.0352 | | 2,030.00 |
| TOTAL OUTSTANDING | | | $20,900.76 |

ROAD AND AIRPORT CONSTRUCTION
BITUMINOUS CONCRETE PRODUCTS

MAC

APPLICATION OF BITUMINOUS MATERIALS
BITUMINOUS CONCRETE MIX PLANTS

**McMinn's Asphalt Co., Inc.**
Post Office Box 4688
LANCASTER, PENNSYLVANIA 17604-4688

September , 1985

L. S. LEE & SON OF PA., INC.
P. O. Box 1547
1150 Greenwood Road
York, Pennsylvania 17405

Ref: L. R. 66187, Section B02
York County
Contract No. 084065

Gentlemen:

Your company made an inquiry as to the results of your quotation submitted for the guide rail items on the referenced project.

This portion of the contract has been awarded to the Disadvantaged Business Enterprise firm as dictated by the quota system requiring 10% of the contract price.

The bid submitted by your firm was competitive with other prices received by our organization.

To put this into prospective, the price from your company was the low quotation received.

Consquently, to meet the DBE provisions and requirements of the contract, the work was awarded to the necessary bidder.

Yours truly,

McMINN'S ASPHALT CO., INC.

W. A. Murdock
Vice President Construction

WAM/gss

PLANT LOCATIONS

| | | | | |
|---|---|---|---|---|
| MANHEIM PIKE, ROUTE 72<br>(NORTH OF EAST PETERSBURG)<br>AREA CODE (717) 569-2623 | MASON-DIXON PLANT<br>FULTON TWP.<br>AREA CODE (717) 548-2181 | ELIZABETHTOWN PLANT<br>MT. JOY TOWNSHIP<br>AREA CODE (717) 367-8289 | McMINN'S ASPHALT<br>PRODUCTS PLANT<br>1061 MANHEIM PIKE<br>(BOOKKEEPING DEPT.)<br>AREA CODE (717) 397-0391 | PARADISE PLANT<br>McILVAINE ROAD<br>AREA CODE (717) 442-4000 |

**ELDERLEE, INC.**

Box 10
Oaks Corners
New York 14518
315/789-6670

Corporate Office:
150 S. Sumner St.
P.O. Box 269
York, PA 17405
717/843-0021

COPY

September 12, 1985

WILFREDO J. GONZALEZ
Associate Administrator for
Minority Small Business &
Capital Ownership Development
Washington, D.C. 20416

Dear Mr. Gonzalez:

Your undated letter addressed to Mr. Angelo Pettigrew has been brought to my attention and I would like to express my view on your decision.

Your so called careful review could not have been so careful in view of the following facts.

1. Letter not dated.

2. There is no company by the name of H. S. Williams & Company. If you are by chance referring to H. J. Williams Co., Inc. I would like to inform you that H. J. Williams Co., Inc. was sold by its owners in October of 1984 and could not possibly have any connection with Ganflec Construction, Inc.

3. Mr. William Shorb is employed by Elderlee, Inc. not Lee Elder as you suggest. Lee Elder is a black golfer and to the best of my knowledge is not in the construction business. If after your continued careful review you find that you were referring to Elderlee, Inc. instead of Lee Elder you will find that there is no similarity at all between the type of business performed by Elderlee, Inc. and Ganflec. Elderlee is a Guide Rail Erector and Fabricator in New York State while Ganflec is a specialty utility contractor operating mainly in Pennsylvania where the similarity occurs I fail to understand.

4. The reason for the lack of financial resources I thought that one of the reasons for the U.S. Small Business Administration was in fact to provide help in the area of financial resources for small emerging disadvantage businesses.

In conclusion I am not surprised by your conclusions it seems like a typical bureaucratic decision not dictated by the facts and your letter certainly demonstrates the lack of careful review that you maintain was given.

Very truly yours,

ELDERLEE, INC.

R. E. Hirschman
President

REH/bj

cc: Senator John Shumaker

U.S. Congressman George W. Gekas

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

Mr. Angelo Pettigrew
Ganflec Construction Co., Inc.
3651 Derry Street
P.O. Box 4378
Harrisburg, Pennsylvania 17111

Dear Mr. Pettigrew:

We regret to inform you that your request for reconsideration of our decision to decline your firm for 8(a) program participation has been declined.

After a careful review of the documentation you have submitted it is still our view that:

(a) Your firm is excessively dependent on H. S. Williams & Company for financial and technical assistance.

(b) Mr. William Shorb, non-disadvantaged owner, is employed by Lee Elder, a firm operating in a similar type of business as the applicant concern.

(c) Your firm lacks prospects for success since it does not have the financial resources to perform at the projected levels.

Since you have utilized the one request for reconsideration allowed under Small Business Administration policy a re-application for the 8(a) program will not be accepted until twelve months from the date of receipt of this letter.

We hope you will avail yourself of the other SBA programs for which you are eligible.

Sincerely,

[illegible] J. [illegible]
Associate Administrator for
Minority Small Business and
Capital Ownership Development

BEST COPY AVAILABLE

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

ROBERT R. NEALL
MINORITY LEADER

HOUSE OFFICE BUILDING
SUITE 312

July 3, 1985

Ms. Suzanne M. Sellner
District Manager
L.S. Lee & Son of Pa., Inc.
9943 Washington Blvd.
Laurel, MD 20707

Dear ~~Suzanne~~ Sue,

Enclosed please find my inquiry to the Maryland Department of Transportation. Perhaps we can shake a reasonable explanation loose. If not, perhaps my Committee can invite them to town for a hearing on the matter.

Thank you for advising me of this matter, and I will be in touch.

Sincerely,

Bobby

Robert R. Neall

RRN:mvw

JUL -8 198[illegible]

ANNAPOLIS AREA (301) 841-3401

WASHINGTON AREA (301) 858-3401

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

ROBERT R. NEALL
MINORITY LEADER

HOUSE OFFICE BUILDING
SUITE 312

July 3, 1985

Mr. James M. Welsh
Deputy Chief Engineer-Operations
State Highway Administration
P.O. Box 717
707 N. Calvert St.
Baltimore, MD 21203

Dear Mr. Welsh:

Enclosed please find a copy of a letter received from a constituent who has a great deal of difficulty understanding the sentence which is highlighted in the second paragraph. I must confess that I am unable to explain it either. I would appreciate it if you could send me an explanation as to why your office would make such a statement to a general contractor.

Your prompt attention to this matter would be greatly appreciated.

Sincerely,

Robert R. Neall

RRN:mvw

cc: William K. Hellmann, Secretary
✓ Suzanne M. Sellner

JUL -8 1985

ANNAPOLIS AREA (301) 841-3401

WASHINGTON AREA (301) 858-3401

**Maryland Department of Transportation**
State Highway Administration

William K. Hellmann
Secretary

Hal Kassoff
Administrator

MAY 28 1985

April 17, 1985

Ms. Ellen B. Higgins
MBE Officer
David A. Bramble, Inc.
P. O. Drawer 419
Chestertown, Maryland 21620

RE: Contract No. Q-624-501-277
Resurfacing with Bituminous Concrete
of the Existing Roadway and Shoulders
on US 301 from US 50 overpass to 300
Feet North of Md Rte 213

Ms. Higgins:

This is to advise that the Affirmative Action Plan Review Committee met on April 15, 1985 and determined that further efforts to involve additional Minority Business Enterprises (MBE's) in the performance of the subject contract will be necessary.

The Review Committee suggests that your organization further solicit MBE's in the area of bituminous concrete hauling and be advised that the Review Committee has reviewed the Guardrail quotes from Guardrails, Etc., Inc., an approved MBE, and L. S. Lee & Sons of Pennsylvania, Inc., as to why L. S. Lee & Sons of Pennsylvania, Inc.'s quotes were used when the quotes appear comparable. If your organization has decided to use L. S. Lee & Sons of Pennsylvania, Inc. solely on the basis of lowest quote, the Review Committee would find that reasoning unacceptable.

In addition, the SHA has verified the MBE solicitations and found that Merit Supply of Maryland and W & K Enterprises, Inc. indicated they did submit a bid; therefore, please submit additional documentation addressing these apparent discrepancies.

Please submit the requested documentation to this office on or before April 24, 1985.

Should you have any questions in this matter, please contact Mr. William L. Forbes on (301) 659-1571.

Very truly yours,

James M. Welsh
Deputy Chief Engineer - Operations

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

March 14, 1985

IN REPLY REFER TO
Cumberland County
L.R. 21048, Section 644
CMS No. 082024

RECEIVED
MAR 18 1985
H. J. WILLIAMS CO., INC.

H. J. Williams Company, Inc.
150 South Sumner Street
York, PA 17405

Gentlemen:

The first and second bid submitted for the referenced project on December 20, 1984 were rejected by the Department because of unsatisfactory DBE submittals. All remaining bids were rejected in the best interest of the state.

This project will be rebid at a future date. Your participation in this project is appreciated.

Very truly yours,

Fred W. Bowser, P.E.
Director
Bureau of Design

Contact Person:
Francis Toth
717-787-6767

[illegible]

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

January 25, 1985

IN REPLY REFER TO

Cumberland County
L.R. 21048 (644)
CMS No. 082024
Bid Opening - December 20, 1984

RECEIVED
JAN 31 1985
H. J. WILLIAMS CO. INC.

H. J. Williams Company, Inc.
150 South Sumner Street
York, PA 17405

Gentlemen:

Your bid submitted for the reference project was rejected as non-responsive because you did not provide the Department with the required DBE documentation within the time specified in the proposal. This rejection is in accordance with the Special Provision entitled "Disadvantaged Business Enterprise Utilization Affirmative Action Requirements".

Returned herewith is your bid guaranty issued with the Hartford Fire Insurance Company.

Your participation in the bid of this project is appreciated.

Very truly yours,

Francis Toth

Fred W. Bowser, P.E.
Director
Bureau of Design

Attachment

Contact Person:
Francis Toth
717-787-6767

(2) Letting December 20, 1984

CUMBERLAND COUNTY - LR 21048(644)

| | |
|---|---|
| *H. J. WILLIAMS CO., INC., YORK | 612,485.70 |
| Fayetteville Contractors, Inc., Fayetteville | 685,206.00 |
| *Morganspan Corp., Camp Hill | 729,763.00 |
| E. F. Goetz & Sons Construction Corp., Chambersburg | 747,220.00 |

DAUPHIN COUNTY - LR 22023(11)

| | |
|---|---|
| ADAMS COUNTY ASPHALT, HARRISBURG | 4,790,226.20 |
| Subs: Rogele, Inc., Harrisburg<br>*Valley Seeding, Sugarloaf<br>Henry Martz, Steelton | |
| *Slusser Bros. Truck. & Exca. Co., Inc., West Hazleton | 5,137,852.46 |
| *Pavex, Inc., Camp Hill | 5,236,431.67 |
| *H. J. Williams Co., Inc., York | 5,523,808.65 |

ERIE COUNTY - LR 295(03M)

| | |
|---|---|
| *W. L. DUNN CONSTRUCTION CO., COCHRANTON | 665,444.95 |
| *Foster Grading Co., Jackson Center | 680,226.99 |
| *Mayer Brothers Construction Co., Erie | 793,700.60 |
| *Joseph McCormick Construction Co., Inc., Erie | 987,231.65 |

ERIE COUNTY - LR 25139(A00)

| | |
|---|---|
| *THOMAS A. MEKIS & SONS, INC., FENELTON | 964,728.00 |
| *H. J. Schneider Construction, Inc., Pittsburgh | 1,043,312.20 |
| McCormick Materials, Erie | 1,337,655.15 |

LACKAWANNA COUNTY - LR 1005(04M)

| | |
|---|---|
| A. BARLETTA & SONS, HAZLETON | 4,988,000.00 |
| Sub: *The Nyleve Co., Emmaus | |
| *American Asphalt Paving Co., Shavertown | 5,617,850.27 |
| Adonizio Brothers, Inc., Wilkes-Barre | 5,817,308.95 |
| Keystone Pavement & Construction Co., Inc., Lake Ariel | 5,891,062.51 |
| *Kaminski Brothers, Inc., Pittston | 6,175,420.20 |
| *James D. Morrissey, Inc., Philadelphia | 6,449,037.75 |

LANCASTER COUNTY - LR 36008(B09)

| | |
|---|---|
| *C. & E. CONSTRUCTION, INC., LANCASTER | 820,310.88 |
| Allan A. Myers, Inc., Worchester | 884,403.67 |
| *Susquehanna Valley Construction Corp., New Cumberland | 955,627.69 |
| *Bear Creek Construction Co., Landisville | 957,111.55 |

LANCASTER COUNTY - LR 36081(B01)

| | |
|---|---|
| *SUSQUEHANNA VALLEY CONSTRUCTION CORP., NEW CUMBERLAND | 545,790.30 |
| *Primo Contracting, Inc., Exton | 548,555.75 |
| *C. & E. Construction, Inc., Lancaster | 553,368.56 |
| *Bear Creek Construction Co., Landisville | 576,825.26 |
| *J. D. Eckman, Inc., Atglen | 576,925.40 |
| Fayetteville Contractors, Inc., Fayetteville | 599,176.75 |
| Allan A. Myers, Inc., Worchester | 748,000.00 |

(4) June 20, 1985

CHESTER COUNTY - LR 15134(M00)

| | |
|---|---|
| *J. D. ECKMAN, INC., ATGLEN | 865,263.27 |
| *Primo Contracting, Inc., Exton | 891,759.70 |
| *Exton Materials, Inc., Exton | 939,367.50 |
| *Melchiorre Construction Co., Malvern | 962,916.76 |
| Allan A. Myers, Inc., Worcester | 969,931.00 |
| *James J. Skelly, Inc., Media | 996,894.24 |

NORTHUMBERLAND COUNTY - LR 49018(005)

| | |
|---|---|
| JAY FULKROAD & SONS, INC., MCALISTERVILLE | 763,806.70 |
| *Faylor-Middlecreek, Inc., Winfield | 799,964.45 |
| *G. & E. Construction, Inc., Lancaster | 897,283.70 |

BUCKS COUNTY - W.O. 97036(000) LR 386

| | |
|---|---|
| *HAINES & KIBBLEHOUSE, INC., SKIPPACK | 728,276.55 |
| *Trinity Paving Co., Conshohocken | 785,279.00 |
| *The General Crushed Stone Co., Easton | 828,421.60 |
| Joseph Ciccone & Sons, Inc., Bath | 922,085.05 |
| *Tony DePaul & Son, Philadelphia | 941,675.05 |

CHESTER COUNTY - W.O. 97033(000)

| | |
|---|---|
| *THE GENERAL CRUSHED STONE CO., EASTON | 659,480.00 |
| *Exton Materials, Inc., Exton | 667,186.50 |
| *Melchiorre Construction Co., Malvern | 669,255.00 |
| *James J. Skelly, Inc., Media | 671,569.20 |
| *J. D. Eckman, Inc., Atglen | 742,565.30 |
| *Tony DePaul & Son, Philadelphia | 808,754.00 |

PHILADELPHIA COUNTY - LR 67362(M00)

| | |
|---|---|
| *JOSEPH PAOLINO & SONS, INC., PHILADELPHIA | 526,539.71 |
| *Union Paving Co., King of Prussia | 571,250.73 |
| James J. Anderson Construction Co., Inc., Philadelphia | 604,171.20 |
| *Tony DePaul & Son, Philadelphia | 629,674.40 |
| *James D. Morrissey, Inc., Philadelphia | 631,994.25 |

CUMBERLAND COUNTY - LR 21048(644)

| | |
|---|---|
| *MORGANSPAN CORP., CAMP HILL | 737,237.00 |
| *Fayetteville Contractors, Inc., Fayetteville | 747,478.00 |
| *Susquehanna Valley Construction Corp., New Cumberland | 773,416.43 |
| *H. J. Williams Co., Inc., York | 785,210.50 |

FRANKLIN COUNTY - A585(671)

PULLED & CANCELLED

NORTHAMPTON COUNTY - LR 48123(A01)

| | |
|---|---|
| ALLAN A. MYERS, INC., WORCESTER | 668,000.00 |
| Bi-State Construction Co., Inc., Easton | 689,177.00 |
| *The Nyleve Co., Emmaus | 837,735.50 |

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401

ELLEN R. SAUERBREY
LEGISLATIVE DISTRICT 5B
BALTIMORE, CARROLL, HARFORD COUNTIES
COMMITTEE:
ECONOMIC MATTERS
269-3237

HOME ADDRESS:
4122 SWEET AIR ROAD
BALDWIN, MARYLAND 21013
[illegible]

November 27, 1981

Mr. R. E. Hirschman
L. S. Lee and Son of Pa., Inc.
5635 Furnace Avenue
Elkridge, Maryland 21227

Dear Mr. Hirschman:

Thank you for the information that you sent regarding the Minority Business Enterprise Program. I think that the hearings have brought to light a number of very valid abuses of this well-intentioned law. There is no substitute in a free enterprise society for the process of competitive bidding. Governmental interference in this system can only create problems.

The legislative climate makes repeal of the MBE Program impossible. However, I believe that we must consider ways to make a bad law better. Among these considerations might be a requirement that subcontractors must perform the contract which they are awarded. This would eliminate the practice of brokering contracts which seems to be occurring. Your suggestion that there should be a cutoff on how long a minority firm qualifies as an MBE is also valid. While a number of charges were made and concerns voiced, I do not feel that we have adequate information to evaluate the degree of abuses.

I believe this program comes up for Sunset Review in 1983. It is my feeling that the subcommittee on Federal-State regulations should request that an audit of the MBE Program be done in order for the legislature to evaluate the actual cost of the MBE requirement to State programs.

In closing let me be clear in my belief that a qualified minority firm should have equal opportunity to compete and be awarded contracts in a competitive bidding situation. The virtual nonexistance of State business to minority enterprises does raise the question of whether there was exclusion or simply a lack of a pool of capable enterprises. I would hope that the private sector could be counted on to insure that a competent minority business is indeed given equal access to both private and public contracts.

Sincerely,

Ellen R. Sauerbrey

ERS/nrb

**CARL M. WEBER STEEL SERVICE, INC.**
P. O. Box 288, Route No. 737 North, Kutztown, Pa. 19530
Phone (215) 683-3503

METAL SIP DECK FORMING REINFORCING STEEL SETTERS SHEAR STUD APPLICATORS CERTIFIED WELDING

January 19, 1984

The Honorable President Reagan
The Whitehouse
Pennsylvania Ave.
Washington, D.C. 20500

Dear Mr. President:

Thank you for taking the time to read this letter. The story you are about to read portraits the life, hopes, and dreams of an unsung American person and the small construction company he dedicated his life to building.

Carl M. Weber was born and raised in rural Kutztown, Pa. in the heart of the Pennsylvania Dutch culture. At age 17 he joined the Merchant Marines and served in World War II for 4 years. After the war he became a Union Ironworker where he learned his trade and practiced it for many years. During that time he was a superintendent for G & H Steel, one of the largest steel erectors in the U.S.A..

In 1960 he formed his own corporation and tried his hand at owning and operating his own business. In the beginning he spent long days on the job and longer evenings taking care of business. Many weeks he had to pay his men with his personal money leaving very little for his family. He had four children and had to care and provide for them. I know well, for I was one of them. Early years in the company were extremely self-sacrificing, but he was determined to succeed in the bridge sub-contracting business.

His idea was to share his dream with his family. Today his wife and all four children are actively involved in the company. It has gone from a desk in our living room to a 17,000 sq. ft. office and warehouse facility.

Over the years we had to jump over many hurdles, such as union harrassment, ever-increasing governmental red tape, senseless and costly state regulations; but somehow we survived and remained flexible. We continually diversified and have achieved growth for the past 22 years. I was beginning to think my children might prosper from what my father started.

During the waning hours of the last session of the U. S. Senate and the House of Representatives, the 10% Minority Participation Amendment slipped through and became part of the Surface Transportation Act of 1982. With the passing of this law our company was dealt an agonizing blow that would undo what took over 20 years to carefully and painstakingly build.

FILE COPY

Immediately what the Federal Government deemed as a "Good Faith Effort," Penn DOT interpreted the program to their own political convenience by enacting the Mandatory Quota System of 10% Minority and 2% Women. Since that time we have received only a hand full of jobs, not nearly enough to cover overhead and expenses.

During the summer of 1983 we launched a massive campaign to make politicians aware of what effect this legislation has had upon majority sub-contractors. We have literally been genocided. Never in our lives as proud Americans have we been treated with such total disregard by our own elected officials. One politician was kind enough to call us a fatal statistic of this program. He was the only honest one in the bunch.

We could see our letters and phone calls were getting us nowhere. Not only were our finances decaying, but so was our work force. A man's loyalty to any company only goes as long as there is food on his table. I do not blame anybody for seeking employment elsewhere for that reason.

Being totally desperate, we decided we would have to either join the MBE market or declare bankruptcy. One day a negro walked into our office and told us "you need me" if you are to survive in the construction business. This fellow has construction experience, but also a long trail of mismanaged and bankrupt businesses behind him. Nevertheless, to survive, we decided to form a MBE company with this fellow. We conformed to all the rules by giving him 51% of the stock, with his mother, brother, and himself having the majority vote on the Board of Directors so they could fire us at any time. We also gave him full financial backing (by putting our own personal homes up as collateral), because he has no assets and no bank would lend him money due to past defaults. You might say, this is an unorthodox way of doing business, but we are desperate to weather this reverse discriminate storm.

After several months of waiting, an investigation from the Inspector General's Office, tons of paper work, and countless phone calls, we were rejected as a Minority Business Enterprise on November 25, 1983. We immediately requested an appeal, but heard nothing. After calling our Congressman, Gus Yatron (the only man understanding to our situation) an appeal was granted December 28, 1983 for the minority representative of the company only. On Jan. 5, 1984 we received a conditional MBE certification. PLEASE READ ATTACHED COPY OF THIS CONDITIONAL LETTER. Read the conditions carefully and put the word Reagan in substitute of Weber and honestly tell me that you would not sue for discrimination.

I ask you, Mr. President, is this the way the free enterprise system became the greatest and most successful system on this planet? "I don't agree." By creating this program you are putting the sword to thousands of small majority contractors like ourselves. Contrary to what your advisors may have told you that there is work for everybody, they are dead wrong. People who have given their whole lives to their businesses have had their heads chopped off with one swing of this deadly legislation.

You and your staff have agreed that small business has remained stable throughout hard times. Then why are you trading hard earned small businesses for opportunists who see a chance to make a quick buck while the money is good, and later run when the well dries up.

I cannot understand your purpose for this whole program, since its original intent was to create jobs for minorities. This is another monumental display of draining the swamp to catch the alligator.

Contrary to the beliefs of some, highway contractors are not against providing employment for minorities.

What the industry favors is a fair approach to providing opportunities for persons willing to take the risk to participate in the competitive enterprise system.

What the industry is against is helping to develop a new class that need not observe the same rules and regulations of others and is given special and preferential treatment.

In the ever present search of an answer to solve discrimination of minorities, you chose to solve this by discriminating against the majority. Two wrongs do not make a right. The American Judicial System does not use the "eye for an eye and a tooth for a tooth" principle; why should other branches of government be allowed to do so. By allowing such "good faith efforts" or QUOTAS, you have taken the food off the tables of hard working sincere people and replaced them with "get rich quick" opportunists. This has greatly fueled the fires of prejudice toward minorities, but most important, we have lost faith in our government. I am beginning to feel honesty and integrity has given way to preferential treatment of special interest groups, just for the VOTE.

I would like you, as our President, to investigate this corruption in Governmental Contracts and to make your findings public. I would like these mandatory set-aside programs dissolved from Federal and State Contracts so Free Enterprise can flourish in a competitive business climate.

Please acknowledge this letter, for it is very important to me that you personally read this letter.

Respectfully,

Bruce C. Weber, Vice-President

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 6 1985

Bruce C. Weber, Vice President
Carl M. Weber Steel Service, Inc.
Post Office Box 288
Route No. 737 North
Kutztown, Pennsylvania 19530

Dear Mr. Weber:

President Reagan has asked that this Department respond to your inquiry concerning the minority business enterprise (MBE) provision of the Surface Transportation Assistance Act of 1982 (STAA).

Section 105(f) of the STAA provides that ten percent of the monies authorized to be appropriated under the act be expended with small businesses owned by socially and economically disadvantaged individuals. In restricting the benefits of this provision to bona fide businesses owned by socially and economically disadvantaged persons, Congress adopted the criteria of Section 8 of the Small Business Act. The implementing regulations promulgated by the U.S. Department of Transportation require that governmental recipients of STAA funds certify the legitimacy of businesses benefiting by Section 105(f).

I share the concern, raised in your letter, that such provisions may result in discriminatory preferences based solely on race to the detriment of firms such as yours.

FILE COPY

When such situations arise -- as you believe occurred in your case -- the matter should immediately be brought to the attention of the General Counsel of the Department of Transportation. The Constitution does not permit Section 105(f) of the STAA to be misapplied in such a discriminatory manner and DOT is the agency charged with responsibility, in the first instance, to insure that the statutory program is being operated constitutionally.

I am forwarding a copy of your letter and my response to General Counsel Jim Marquez for his review. Please let me know if I can be of further assistance.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Jim J. Marquez, Esquire
General Counsel
U. S. Department of Transportation

Associated
Builders and
Contractors, Inc.

729 15th Street, N.W.
Washington, D.C. 20005
(202) 637-8800

TESTIMONY OF
GERALD BUESING, PRESIDENT
BUESING CORPORATION
ON BEHALF OF
ASSOCIATED BUILDERS AND CONTRACTORS, INC.
BEFORE THE
TRANSPORTATION SUBCOMMITTEE
SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
U.S. SENATE
NOVEMBER 19, 1985
ON THE
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM (DBE)
(1982 SURFACE TRANSPORTATION ACT, SECTION 105F)

Merit Shop Builds Best

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

It is a pleasure to appear before the Transportation Subcommittee of the Senate Environment and Public Works Committee to testify on the Disadvantaged Business Enterprise Program (DBE) authorized in the 1982 Surface Transportation Assistance Act, Section 105(f). The DBE Program has generated considerable controversy and I appreciate the opportunity to express the concerns of Associated Builders and Contractors on the impact the DBE Program has had on the construction industry.

I am Gerald Buesing, President of Buesing Corporation which has been in business in Long Lake, Minnesota for twenty years. The Buesing Corporation is a $10 million construction firm which contracts for heavy and highway construction as well as being hauling and trucking contractors.

Associated Builders and Contractors (ABC) is a national construction industry trade association representing more than 18,000 firms nationwide. The members, contractors, subcontractors and suppliers of ABC believe in the "merit shop" philosophy of awarding construction contracts to the lowest responsible bidder. Today more than 75% of all construction in this country is done the merit (open) shop way. Eighty percent of our members are subcontractors, making ABC the trade association representing the largest number of firms and, consequently, that organization most concerned with the ramifications of the ten percent DBE set-asides for the country's subcontractors. I am pleased to bring to the committee the views of my fellow members at ABC.

Historically, Federal-aid highway contracts have been awarded through competitive bidding procedures to the lowest responsible bidder. This has resulted in quality highway construction with the most construction value for the taxpayers' dollars. In 1977, the Federal Highway Administration began setting nationwide goals for minority business participation in the Federal-aid highway program which was to serve as a stimulus for contract awards to DBEs. By 1983, this goal was in effect changed to a 10% quota when the Department of Transportation began implementing regulations carrying out Section 105(f) of the 1982 Surface Transportation Assistance Act. Under these regulations, unless otherwise authorized by the Secretary of Transportation, at least 10% of the federal-aid highway program funds are to be awarded to DBE contractors. This stringent 10% DBE requirement fails to recognize the need for flexibility and cooperation which we believe Congress had originally intended in its minority provision.

We believe that the DBE Program is a reactionary, short-term, stopgap measure addressing not the problems but only the symptoms of the DBE firms. We have poured money into a program which only assists minority firms in the short-run rather than investing that money in a program that will give those firms the long-term capabilities they need for competing in the real world without any special preferential treatment. Forced requirements for bringing in DBE firms have not made them competent, competitive enterprises. Many DBEs have problems with the following: the costs of business, sound business practices, lack of supervisory personnel able to run projects properly, and lack of good qualified craftsmen on their jobs. We know of no ABC contractor that will not accept the low bid from a competitive subcontractor who is capable, regardless of the minority status. The main requirement is that the subcontractor can deliver his services at the price he bid, within the time constraints of the contract and with the quality level expected by the owner ... which in the case of highway construction is the American taxpayer. With this in mind, we feel that we should not be placing money in set-aside programs but rather going to the root of the problem and invest in the future of DBEs by making their firms skilled on both the craft and management levels, thereby making them competitive without the need for special bid treatment.

Because the DBE program has not really addressed the problems of minority firms but only the symptoms, we are seeing the effects of the program these past two and one-half years manifested through the lack of qualified and capable DBEs, higher costs, and negative effects on non-minority specialty contractors.

## IMPACTS OF THE 10% DBE REQUIREMENT ON CONTRACTORS

ABC's policy is to assist, to the maximum degree possible, minorities who are seeking employment in the construction industry and minority firms which are seeking to participate in the free-enterprise system. We have found, however, that programs which establish set-asides have proven to be unworkable. This is not to say that federal efforts to increase minority business opportunities are not necessary or that contracting goals cannot serve as an effective stimulus for contract awards to DBEs.

Today I will review with you some of the major problems faced by our contractors in complying with the 10% DBE requirement. My discussion will center around the following: (1) lack of qualified and capable DBEs; (2) higher costs associated with the DBE program; and (3) the negative effects of the program on non-minority specialty contractors.

## 1. Lack of Qualified and Capable DBEs in the Federal-Aid Highway Program

ABC members have found serious difficulties in meeting the 10% DBE requirements on contracts because of the lack of qualified and capable DBE firms in the construction business. A member from our ABC Spokane Washington Chapter sums it up when he says: "He would bid and do three times the amount of work he is currently performing ($2 million to $3 million) if he did not have the 10% requirement." The reason he doesn't bid is that he can't find enough certified and capable DBEs to do the job. In a recent GAO study (March 1985) of the DBE program in six states, it was noted "Although the data indicated that DBEs have sufficient capabilities to meet a 10 percent goal, DBEs are not necessarily available for all highway construction projects." This narrows the competition on many public-funded construction projects.

I would like to highlight this problem by relating an experience I recently had in finding DBE firms for highway work in Minnesota. On a state highway project in Washington County, Minnesota, Project #SP8282-74, bid this past October I went through the following experience in finding DBE firms:

The state listed 138 certified minority contractors. Forty-two of them did not even do highway work; 8 on the list could not be located or their phones were disconnected; 12 were suppliers which we couldn't use; 4 told us they couldn't perform work in the magnitude needed; 9 sent letters back saying they weren't quoting, 31 were contacted by phone and they said they weren't quoting. Twenty-seven DBEs were contacted and never returned our calls. That totals 133 out of the state listing of 138 certified DBEs. The remaining 5 DBEs did quote us. Of those 5 that quoted — one quoted on unrelated work, one was a supplier, which we couldn't use, and in the end we did receive three useable quotes — two on trucking and one on landscaping.

On that specific job the requirement for DBE was 10% with a 4% requirement for WBE. I was not awarded the job. It is frustrating to go through the entire process of contacting 138 DBEs only to find three quotes that are useable. I want you to know, however, that this is not an exceptional case. This is a typical experience for highway contractors.

Another aspect to this problem is that when capable DBE firms are found, they generally bid for and receive more work than they can perform. When this occurs, the contractor must seek out other unknown and often unreliable DBE firms to do the work in order to meet the requirement. If the DBE firm receiving the award is incapable of performing the work, the general contractor will most often wind up doing the work himself but still paying the DBE. Our Minnesota Chapter, in a survey of its members using DBEs, found that about 10% of the DBEs did not adequately perform.

Prime contractors are required to give a bond to the State or Federal government on their contracts. It is rare, however, that the DBEs bond to the general contractor. The DBEs have bonding problems most frequently because they have no track record. Due to this, a general contractor, in essence, becomes the insurance agent for the DBE. Additionally, contractors often provide financial support to DBE subcontractors by lending equipment, materials or funds. In reality, the general contractor assumes the burden of the financial responsibility, often a good part of the contracting responsibility and the minority never receives the necessary "on the job training" to qualify them for future independent work.

States unable to meet the 10% goal because of a shortage of minority businesses can obtain a waiver from the Department of Transportation for a lesser percentage according to its minority population. This is rarely done. For 1985, there were only five states that sought and obtained waivers. The waiver process itself is an arduous one, however, the bigger problem is that governors must approve any target levels below the 10% submitted to the Federal Highway Administration. Most states are tempted to take the less politically painful move of starting out with a 10% goal and then justifying their failure to meet it.

Many states appear to be meeting and sometimes exceeding their 10% goals. In some cases, however, this has only been accomplished by pass-through companies which are technically correct DBE firms that are not operating in the spirit of the law or in the manner in which the program was intended. Pass-through companies, or "fronts" have been encouraged by the short supply of DBE firms. General contractors intent on bidding jobs and meeting DBE requirements will often resort to hiring storefront DBE operations and/or to paying a premium to secure a minority contractor so that the overall bid would be acceptable to the federal government. Many of our members have told us there are a lot of "fronts" but not enough bonafide DBE firms to meet the 10% requirement. This is a disturbing problem for ABC contractors who seek to hire bonafide minority firms and it certainly negates the intentions of the program to develop minority businesses able to effectively compete in the private sector.

### 2. Higher Costs Associated with the DBE Program

ABC has heard from a number of members complaining that the DBE requirements of federal contracts have increased overall costs due to poor management on the part of DBE firms. In Houston, Texas, for example, the inability of a minority subcontractor to finance the purchase of his own materials needed to complete the project, forced the prime contractor to hire another contractor at an additional cost of $7,000.

Poor performance and lack of skills on the part of the minority subcontractor has been costly to the general contractor. An ABC member firm from Sunnyside, Washington told us about a DBE firm that performed work for him on a highway project. When he went back to check on the work, it had been performed poorly and needed to be completely redone. This wound up costing that contractor twice as much as if he had originally done the work himself because he had to pay the DBE even though his people did the work.

The administrative costs incurred in finding capable DBEs through telephone calls, mailings, and telegrams for quotes on bids are high and oftentime have caused general contractors to hire extra personnel. This does not take into consideration the general frustration of not being able to find DBEs which I related earlier. Additionally, when a DBE is unable to perform as agreed, as is often the case, work is delayed and the costly process must begin again.

Most importantly, costs are substantially higher on contracts because prime contractors have to utilize quotes from minority firms to fulfill the 10% requirement. These minority firms, in most cases, are not the low bidders, but contractors have little choice but to use them. One of our member contractors from Idaho noted that a DBE requirement will generally add on 10 to 14% more on a project.

While this data is from a DBE project for sewage construction, the principle parallels the problems associated with highway DBE projects. The following statement is from Northwest Contractors and Engineers, Inc., Couer D'Alene, Idaho. "We were the contractor on two EDA grant contracts in that time period (1980), and fulfilled the minority requirement by utilizing the minority firm of X and Y Construction. X and Y had been in business for some years as Z Construction Company and formed a 50-50 partnership with Y to participate in projects with "hard" DBE requirements. X was very open in his method of operation. He simply called us to make us aware that he was willing to subcontract to any trade category of any job for a six percent "fee" which was to be added to the low bidder in whatever category we wished to utilize X and Y. On a particular project the system worked as follows:

EDA Project #07-51-26332 and #07-51-26365. The low electrical bidder was Q Electric, a contractor normally in business in this area at $51,540. The "fee for X and Y Construction Company was $3,092 and the revised contract for X and Y Construction Company was $54,632.

I do not believe this is the intent of Congress.

### 3. Negative Effects of the Program on Non-Minority Specialty Contractors

One of the unforeseen impacts of the DBE program has been the harmful exclusion of non-minority subcontracting firms. Because highway construction does not lend itself to a large or significant amount of subcontracting, only around 10 percent is available for subcontract award. Since firms are required under Section 105(f) to subcontract 10 percent of the amount of the highway contract to a DBE, general contractors on highway construction jobs are being forced to award 100 percent of that subcontract work to minority firms, to the exclusion of non-minority subcontracting firms.

A significant number of ABC members are small subcontractors and we have heard numerous stories about their loss of volume and actual closings since 1983 due to the DBE program. Many of our local chapters have reported that their members feel this program discriminates against them. Here again, I can relate a story from my own business and the impact the DBE has had on it:

"About five years ago, my trucking speciality firm did approximately a $3 million volume business. To date for 1985, I anticipate probably around $250,000 in business. In addition, I have found it necessary to sell all my construction trucks. The reason for the decided drop in volume and for the sale of my construction trucks is that on all my highway projects, I have had to subcontract out to other minority trucking firms in order to meet the 10% minority requirement.

The bottom line is that the DBE program to encourage minorities and disadvantaged DBE firms into the construction business has not worked. Without the preferential treatment, few would be able to make it on their own. Handouts have never made for self-sustaining, self-reliable companies. There is an old Chinese proverb that still remains true today: "You teach a man to fish and he feeds himself for life". That's really what we want to address -- the need to invest in training.

The set-aside program forces general contractors to find minority subcontractors for projects which they may or may not be able to perform. This is similar to renting your house as opposed to owning it. There is no equity and therefore there is no investment in renting and there is never any investment on the money spent by that renter. However, a home owner develops equity and economic advantages of money invested in the home he owns. Taken as an analogy, a good sound investment, one that will create "equity" is training and education. In other words, contractors would more readily spend money in helping those interested DBEs in becoming better business people through proven training programs rather than by forced, unsound DBE programs.

## RECOMMENDATIONS

ABC believes that the investment of training Disadvantaged Business Enterprises for the purpose of improving their management abilities and preparing them for private sector projects is the better solution rather than perpetuating artificial and counter-productive set-asides.

Improvements can be made in the training programs being offered by the Federal government and the private sector as well. The GAO issued a report (April 1981) which found that only four percent of DBE firms participating in the Small Business Administration's 8 (a) set-aside program between 1968 and 1980 "graduated" to private sector work. A similar figure applies to highway construction. Set-aside programs simply aren't working! ABC believes that improved management skills and better access to job training programs for unskilled workers would help DBEs compete in both the public and the private sector.

The federal government has taken the correct approach in the Jobs Training Partnership Act (JTPA). Through the use of Private Industry Councils (PICs), the private sector will be involved in setting goals and activities for training programs in a manner consistent with the actual demands of the market. At present, JTPA is designed to help disadvantaged youth, unemployed veterans and dislocated workers at the craft or "blue collar" level. This program has flourished (taking over from the old and ineffective CETA Program) because of JTPA's emphasis on training. Another component could be added to this program to develop supervisory and management training geared to the DBE firms. In addition, the U.S. Office of Minority Business Enterprises in the Department of Commerce should work with the private sector to increase the availability of management training programs to disadvantaged firms.

The main weaknesses in DBE firms participating in the highway program is their lack of good supervisory and management skills. Training by industry for industry is the best route to go to develop the needed capabilities by DBEs. ABC has taken the lead in developing a training curriculum to provide craft training through its "Wheels of Learning" Program. Wheels of Learning is a competency based, task oriented training program designed to maximize learning in 23 different construction skill areas. Additionally, ABC now has in place a supervisory level training course called TOPS (Training Orientation Program for Supervisors). This is an aggressive plan for strengthening higher level construction business skills. ABC is willing to provide to State or Local transportation agencies these programs for use in training DBE firms.

Virtually all major construction associations offer extensive supervisory training programs. A well-respected supervisory program that has been offered for years in the construction industry is the STP (Supervisory Training Program) developed by the Associated General Contractors. This program has been used by some State Highway Departments as a training course for DBEs. More local contractor trade associations should work closely with state departments of transportation in providing training curriculums.

Many industry associations, like ABC, have local chapter offices which offer reduced membership rates for minority firms so they can avail themselves of the benefit of joining with the industry groups. Often we provide training seminars to them at half the charge to other members.

Associated Builders and Contractors recommends that joint efforts be made on the part of government and the private sector to upgrade the management skills of DBE firm owners and managers with the goal of bringing more DBEs into competitive, free market exchanges. As long as DBEs are sheltered from reality by artificial set-asides created by the federal government, they will remain ill-equipped to deal with the realities of the free enterprise system.

Therefore, ABC urges that the 10% DBE program be eliminated from the reauthorization of the federal-aid highway bill in 1986.

Thank you MR. CHAIRMAN.

Testimony of

The Associated General Contractors of America

Presented to

The Subcommittee on Transportation

of the

United States Senate

November 19, 1985

on the topic of

The Disadvantaged Business Enterprise Requirements

of the 1982 Surface Transportation Assistance Act

SKILL RESPONSIBILITY INTEGRITY

AGC is:

- More than 32,000 firms including 8,400 of America's leading general contracting firms responsible for the employment of 3,500,000-plus employees;
- 110 chapters nationwide;
- More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utility facilities;
- Approximately 50% of the contract construction by American firms in more than 100 countries abroad.

## THE IMPACT OF SECTION 105(f) OF THE 1982 SURFACE TRANSPORTATION ASSISTANCE ACT

Section 105(f) of the 1982 Surface Transportation Assistance Act requires that at least ten percent of the Act's funds be expended with business concerns owned by specially designated minority group members, or "Disadvantaged Business Enterprises" (DBEs), to the exclusion of all other bidders.

Such a requirement is particularly harmful in highway construction which does not lend itself to a large or significant amount of subcontracting. Highway construction is an equipment intensive and capital intensive industry. On the average, 90 percent of a typical highway construction contract is accomplished by the general contractor's own work force, leaving approximately 10 percent available for subcontract award.

The result is that under the mandate of Section 105(f) to subcontract 10 percent of the amount of the highway contract to a Disadvantaged Business Enterprise (DBE), and with only 10 percent of the contract available to subcontract, general contractors on highway contruction jobs are being forced to award 100 percent of that subcontract work to minority firms, to the harmful exclusion of non-minority subcontracting firms.

Another variation of this exclusionary theme, utilized by some states to meet the requirements of Section 105(f), is to simply set-aside entire contracts and limit bidding and award only to DBE firms.

In either variation the result is the same. The awarding entity -- be it general contractors for subcontract awards or state transportation departments for prime contract awards -- cannot make contract award decisions solely on the basis of lowest price, or merit, or competence or any other relevant factor, but must, in fact, make award on the basis of whether the firm is owned and controlled by individuals who meet the racial definition required by Section 105(f).

AGC can think of no other accurate way to describe Section 105(f) than as a race conscious program which, under the banner of affirmative action, is resulting in affirmative discrimination.

Section 105(f) has now been in effect for two and one-half years. What impact has it had? Has it increased the number of minority firms interested in and qualified to perform Federal-aid highway construction? Has it increased costs? Has it adversely impacted non-minority subcontractors?

In an effort to obtain detailed information on the impact on the construction industry of Section 105(f), AGC, in December, 1984 conducted a nationwide survey of its highway contractor membership. Over 400 responses were received. The survey responses provided definitive answers to the above questions.

The following is a summary of the responses to the AGC Survey on Section 105(f):

Question #1:

When the 1982 STAA was enacted, were there sufficient numbers of qualified (i.e., possessing expertise and capabilities required to perform highway construction work) minority construction firms in your state to justify a 10 percent minority business participation requirement in your state's Federal-aid highway construction program?

YES - 2.5%

NO - 97.5%

Question #2:

If the answer to "1" is "No", what level of minority business participation (other that 10 percent) more accurately reflects the availability of qualified minority construction firms in your state interested in performing on Federal-aid highway construction contracts?

Nationwide Average - 2.8%

Question #3

Have you found qualified minority firms which are not interested in performing work on Federal-aid highway construction projects?

YES - 44%

NO - 56%

Most common reasons given for DBEs not being interested in highway work:

1. Project location too far away;
2. Don't want to work for State: paperwork, regulations, red tape, specifications (too strict), inspection (too rigorous);

3. Too busy;
4. Bonding requirements;
5. Required union affiliation;
6. Getting certified as a DBE too much of a hassle; and
7. Don't want to be identified as a "minority" or a "disadvantaged" individual.

Question #4:

The STAA and Section 105(f) have now been in effect for two and one-half years. What has happened to the availability of minority businesses qualified to work in Federal-aid projects in your state during that period?

- Availability has increased - 43%
- Availability has decreased - 8%
- Availability has remained about the same - 49%

Question #5:

In establishing minority business goals on individual construction projects, does your state highway department take into consideration such factors as subcontracting possibilities, current availability of minority firms, the capabilities of those firms, etc.?

YES - 34%

NO - 66%

Question #6:

Do you believe Section 105(f) has increased costs of Federal-aid highway projects?

YES - 96%

NO - 4%

Question #7:

If your answer to "6" is "Yes", what do you believe the cost impact of Section 105(f) to be?

Nationwide Average - 7%

Reasons for cost impact (3 most common):

1. Having to accept DBE quotes when receiving lower quotes from non-DBEs or when able to do the work for less using own forces;
2. Expense associated with soliciting quotes from DBEs, etc. -- increased bidding costs;
3. Increased costs associated with contract performance -- financial uncertainties associated with working with unknown, underfinanced or inexperienced DBEs.

Question #8:

On its face, do your highway department's specifications allow for the award of contracts to bidders who have failed to meet the contract's minority business goal, but have made best efforts to do so?

YES - 74%

NO - 26

Question #9:

If the answer to "8" is "Yes", in practice, do you believe bidders must actually meet or exceed contract goals before they will be awarded the contract?

YES - 75%

NO - 25%

Question #10:

In attempting to meet minority business goals on Federal-aid highway projects, have you had to subcontract work to minority businesses even though non-minority firms have quoted lower prices for the work?

YES - 86%

NO - 14%

Question #11:

Have you had contracts where minority subcontractors have been unwilling or unable to perform?

YES - 72%

NO - 28%

Question #12:

Do you personally know of specialty subcontractors who are being, or have been forced out of business because their discipline is one in which minority firms are largely being used to meet contract minority business goals?

YES - 58%

NO - 42%

Many AGC members responded to the AGC survey by giving specific examples of non-minority specialty contractors whose livelihoods are being threatened as a result of Section 105(f). Additionally, many non-minority specialty firms detailed the harmful impact Section 105(f) is having on their ability to remain in business.

The following is a sampling of actual responses received by AGC detailing the harmful impact of Section 105(f):

Arizona

Robert R. Adams
Robert R. Adams Construction Corporation
Phoenix, Arizona

"Our company cannot compete because of the preference given my minority competitors. We are about to quit business."

Colorado

Richard Randall
Randall & Burke, Inc.
Littleton, Colorado

"We do highway seeding and landscaping work and our work is mandated to being subbed to minorities or if it is a prime contract, it is set aside for minorities. Our volume has decreased from approximately $1,000,000 in state work to $250,000 in an increasing market. We are told we are low (bidder) but they can't use us because of the 10 percent goal."

Delaware

Richard M. Appleby
George & Lynch, Inc.
New Castle, Delaware

"There are subcontractors who have not gone out of business, but have been hurt by not being able to do work for general contractors due to the quotas. These are Subs who, in some cases, we had been dealing with for more than 25 years."

Idaho

Roger Laughlin
Idaho Construction Company
Twin Falls, Idaho

"Within our area it has hurt non-minority contractors quite substantially. In our bidding process I hardly even solicit a bid from a non-minority contractor. I can't use them even if they did quote. In a recent $8.5 million job we bid, I did not (could not) solicit any non-minority bidders or I could not meet the quotas set up for the job. Small non-minority contractors dislike the 1982 STAA. It's desroying their livelihood and their respect for our government. It's an unfair law and results in reverse discrimination against contractors who have been in business for many years. Rather than assisting in non-discrimination toward ethnic groups, it is polarizing such groups."

Illionis

Jerry Hamann
Hoeffken Brothers, Inc.
Belleville, Illinois

"Many firms (Non-DBE) have reduced their work force by as much as 50 percent because of lack of work. 1985 will probably put them out of business because they will receive less work this year."

Indiana

John L. Schultz
Baker & Schultz, Inc.
Decatur, Indiana

"A non-minority company has done aggregate hauling for us for over 10 years. On three different contracts we had to use DBE firms...The non-minority company has informed us that his receipts are decreased by 30 percent because of the DBE goals."

Iowa

L. William Kehe
Kehe Construction Company
Waverly, Iowa

"(a non-minority company) used to do our guardrail work but has had to leave the guardrail business because it is one of few subcontractable bid items that minorities have any qualifications in."

Kansas

Elizabeth L. Powell
Paul D. Powell Construction Firm
Larnard, Kansas

"We are WBE (Women Business Enterprise) contractors. We feel that we are gradually being pushed out of business because of the goals of Section 105(f)...I feel that this is one of the most unfair pieces of legislation there is. Since when is it right to DICTATE that one business should get a job because they are a minority or woman? Even though we are a WBE, I would rather actively compete because I had the best price and did the best job."

Kentucky

J. G. Crawford
J. G. Crawford Enterprises, Ltd.
Paducah, Kentucky

"(a non-minority firm) is not yet out of business, but will always ask first if there is any use submitting a quote. Several contractors tell them there is no possible way they could use a non-minority seeding and guardrail subcontractor."

Maine

Ronald H. Lee
Lee Brothers, Inc.
Albion, Maine

We are not specialty contractors, but rather a small general contractor. We are being forced out of the highway program by the 10 percent minority clause. Our opinion of the minority quotas as set up in this state is that they are helping a handful of minorities with no visible effect on the others. We feel that the taxpayers of the State of Maine and of the United States are paying dearly for a pittance of benefits."

Michigan

Gale Rewa
Milbocker & Sons, Inc.
Allegan, Michigan

"Some of the best and most reliable companies in the guardrail and restoration business have disappeared because of MBE quotas. Also, companies doing concrete curb, gutter and a sidewalk work have suffered."

Minnesota

John Dieseth
Dieseth Specialty Company
Fergus Falls, Minnesota

"In many cases, at least twelve last year, prime contractors awarded subcontracts to minority firms over us because of the goals. I would say the average price increase is 5 to 10 percent."

Missouri

Bert A. Estabrooks
Richardson & Bass Paving Company
Columbia, Missouri

"Most non-minority seeding, fencing, guardrail and lanscaping specialty contractors are either out of business or having an extremely difficult time since the 10 percent quota was passed."

Montana

Jan M. Livesay
Livesay Traffic Maintenance, Inc.
Great Falls, Montana

"For the past two years, we have been competitive in our painting and signing prices. However, the prime contractors, needing to meet their goal requirements, have had to award this portion of the contract to a DBE/WBE. We have an expensive investment in a new paint machine, but so far have not been given the opportunity to use it because of lack of work. Prime contractors have been outspoken to us on this matter -- they chose the minorities and women businesses over us to guarantee award of the contract, even though we were low.

It is important for you to know some additional thoughts on this matter. We are not opposed to women in business. We are not opposed to Indians, Blacks, Hispanics, etc. in business. On the contrary, we welcome competitive bidding in our business. This is what free enterprise is all about to us. We are opposed to the control over the awarding of these contracts. This whole Surface Transportation (Assistance) Act belies the initial conception of its beginning, i.e. to avoid discrimination against any one individual(s). We have become the minority; we are being discriminated against. Our business is suffering considerably because of this Act."

Nebraska

Stuart Gerhold
Castle Construction
Columbus, Ohio

"There are many specialty subcontractors who are close to going out of business as they have lost markets that were their livelihood. We used to perform a large amount of storm sewer work and now can't get the work when we are low because the prime contractors need a minority to meet their goal."

New York

Ernest Demetriades
Elderlee, Inc.
Oak Corner, New York

"We lose approximately 45 percent of the projects we quote on because contractors are intimidated and coerced by the New York DOT Affirmative Action personnel into awarding the work to a minority firm at a higher price in order to meet the contract goals."

North Carolina

Jean P. Berry
Cumberland Paving Company
Fayetteville, North Carolina

"Guardrail and seeding contractors who existed prior to 105(f) have either disappeared or merged with minorities. They are a direct victim of discrimination. This is a program of reparation, not minority realization."

North Dakota

Don Carlson
Border States Paving, Inc.
Fargo, North Dakota

"Many firms that are in the specialty items are being hurt by minority firms because this is an area that is easy to get into and one area that is usually easy to get a minority quote. Many firms do not even quote any more because they know the minorities will get the work."

Ohio

Thomas J. Hug
Hug Concrete Paving, Inc.
Norwalk, Ohio

"Our firm specialized in concrete curb, curb and gutter, sidewalk, median barrier, and pavement markings. What has been the detrimental impact of the DBE, MBE, and WBE set aside program on our corporation? It has reduced the volume of our work from just over $12,000,000 in 1980 to just over $4,000,000 in 1984, and as of December 1, 1984 we have ceased bidding. We have sold some of our equipment to a minority firm and presently are leasing the rest to the same firm. If this firm continues to be successful, we hope to sell them the remainder of our equipment. This minority firm is also absorbing a large number of our former employees -- some of whom have been with us over 30 years. It is quite a sad event to see that which took 33 years to build and which you expected to see your family continue suddenly dissolved, not bebecause of anyone's deficiency, but simply because of the color of their skin and Federal and State Legislation. If we can be of any assistance in helping you fight such discriminatory legislation, plese contact us."

Oregon

John W. Minor
Coral Construction Company
Wilsonville, Oregon

"Our major line of work has been as a specialty subcontractor in the area of guardrail, barrier and permanent signing. As as direct result of the 1982 STAA setting DBE goals, our company, as a non-DBE, has been adversely impacted economically. My partners and myself are seriously questioning our ability to survive any longer in this type of market."

Pennsylvania

Thomas M. Pisula
Green Acres Contracting Co., Inc.
Scottsdale, Pennsylvania

"The following is a copy of a letter I wrote to my Senator in response to a request for a campaign contribution:

In response to your request for support, I am sorry to say that I will be unable to support this or any political fund in the future because our political system is depriving us our livelihood.

To explain, when Congress passed, and President Reagan signed into law, the Surface Transportation Act of 1982, whereby a 10 percent quota, (sorry goal), for Disadvantaged Business Enterprises was established (with no committee hearing, debate or discussion on the matter) this little political manuever to pacify and gain support of the Black Caucus has caused our business to be virtually worthless.

We are a guardrail and landscape contractor of which 90 percent of our work is on a subcontract basis from prime contractors. Since we are not a certified DBE Enterprise, our quotations or bids are overlooked even if we are the low bidder, because the prime contractor is required to meet a DBE quota (sorry goal).

Without work, we have no profits. Without profits, we have no available monies for our political system. When Congress realized the harm they have dealt to companies such as ours and does something about it, we will again be able to support monetarily our political system."

South Dakota

Clifford Nelson
Northwest Fencing Company
Chester, South Dakota

"We are specialty subcontractors who have been in business for 28 years and have a very proud track record in our state for doing high quality work with very high relationships with both prime contractors and our highway department. But due to this unfair law of the land we are grossly discriminated against and forced out of business -- besides not having a market within which to sell our company. Nobody can buy our business and hope to stay in business as long as this unfair law is in effect. We have tried to sell at 30 cents on the dollar, but still are not able to. Please -- anything you are able to do will be deeply appreciated by all of us."

Texas

Randy T. Rogers
Rogers & Clark, Inc.
Garland, Texas

"Texas DOT -- Collin County; December 1984 letting -- prime contractor was forced to use a DBE price on sewer that was $50,000 higher in order to meet DBE goals.

Texas DOT -- Grayson County; December 1984 letting -- prime was forced to use a DBE price $180,000 higher to meet the goals.

We were the losing subcontractor in each case."

## Washington

Fred Hobbs
Acme Concrete Company
Spokane, Washington

"(a non-minority company) was one of the leading signing and guardrail contractors in the Salt Lake Valley. As a result of DBE/MBE requirements, their business has diminished considerably. They are not out of business, but they have a very difficult time obtaining subcontracts for signing and guardrail, even though they are usually very competitive. We receive many lower quotations from non-MBE/DBE subcontractors for signing and guardrail work that we must ignore in favor of higher DBE/MBE firms in order to meet these ,goals'."

## Wisconsin

Bob Fetting
Tri State Construction Co., Inc.
Nelson, Wisconsin

"(a non-minority firm) was the finest landscaper and most reasonable in the State of Wisconsin. He was in business for approximately 35 years and forced out of the operation due to the minority requirements."

## Wyoming

Lee Middleton
Energy Electric Company
Sundance, Wyoming

"We have not yet been forced out of business, but our volume is reduced greatly because of minority business enterprise goals. We have stopped bidding snow fence, signing, guardrail, and many concrete items because general contractors must use minority prices even if we are low bidder."

## THE IMPACT OF SECTION 105 (F) -- CONCLUSION

AGC survey allows one to draw the following conclusions with regard to the impact of section 105(f):

Section 105(f) of the Surface Transportation Assistance Act of 1982 was enacted without an adequate understanding of the availability of qualified DBE firms or the time required by new DBE firms to develop expertise in the types of transportation construction work authorized by the Act.

Many problems are being encountered in the implementation of Section 105(f), including project delays and extra costs such as those documented by the General Accounting Office in its study of the 10 percent minority business enterprise requirement of the Public Works Employment Act of 1977.

Because of the manner in which the Department of Transportation is dictating that the states implement Section 105(f), contractors bidding on Federal-aid transportation construction projects must meet or exceed DBE goals before they will be awarded the contract; i.e., Section 105(f) is being implemented as a quota program.

The implementation of Section 105(f) as a quota program is causing many non-minority specialty contractors to be forced out of business, even though they often are quoting the lowest price to prime contractors, since prime contractors, in order to meet contract quota requirements, are being forced to use minority subcontractors, regardless of price. An entire class of non-minority contractors is being systematically excluded from the right to participate in the very type of work which sustained them and their employees over the years, due to the fact Section 105(f) has, in effect, exclusively reserved such wok for DBE firms.

Because Section 105(f) is being implemented as a ten percent quota requirement; because only ten percent of a highway contract is normally subcontracted by the prime contractor; because the type of work is normally subcontracted is in specialty areas such as landscaping, guardrail installation, fencing, striping and signing; and because the overwhelming majority of DBEs exist in these specialty areas, which require minimal initial capitalization, Section 105(f) is threatening the very existence of many small non-minority specialty subcontractors in every region of the country.

For all these reasons AGC urges this Subcommittee to give this issue its closest scrutiny. AGC urges the Subcommittee to conclude that no DBE quota requirement should be contained in the 1986 highway legislation.

In closing, AGC wants to leave the Subcommittee with a clear understanding of its position on the extention of Section 105(f). This issue is of such great concern to our members, that AGC recently concluded that should Congress pass a 1986 highway bill which extends the provision, AGC will seek a veto of the legislation. Our members have decided they would rather risk giving up their livelihoods than continue trying to operate their businesses under an unconstitutional and immoral requirement which is discriminating against thousands of non-minority firms, which is costing the taxpayers hundreds of millions of dollars annually, which is doing little, if anything, to create qualified and lasting minority construction firms, which is, rather, resulting in a shell game of meaningless and misleading numbers and data, and which is forcing thousands of otherwise well-meaning and honest highway contractors to engage in questionable business practices to meet unrealistic and unbending DBE goal requirements.

# STATEMENT OF CHARLES JOSEPH
PRESIDENT OF CHARLES JOSEPH COMPANY, INC.
TO THE
TRANSPORTATION SUBCOMMITTEE OF THE ENVIRONMENT
AND PUBLIC WORKS
REGARDING:
DISADVANTAGED BUSINESS ENTERPRISE
PROVISIONS OF SEC. 105(f) OF THE
SURFACE TRANSPORTATION ASSISTANCE ACT

I am Charles Joseph, President of the Charles Joseph Co., Inc. a minority-owned enterprise, located in Rockford, Illinois. The Charles Joseph Company was founded in 1975 as fifty percent (50%) minority-owned firm. It was established as a mentor/protege' type organization under the guidelines set by the State of Illinois. The guidelines at that time were very loose, but later we were required to change ownership so the I owned fifty-one percent (51%) of the company. The main thrust of the Charles Joseph Company is in the area of traffic control. We supply, design, set up, and maintain traffic control for highway construction projects.

As one might well guess, the Surface Transportation Act of 1982 was quite a welcome advent. Although time will not now permit an indepth discussion of my philosophical bent toward quotas, set-asides, or preference programs for minorities or women, I do have some concerns with regard to Sec. 105(f) of the Surface Transportation Assistance Act of 1982 (STAA), which states:

> Except to the extent that the Secretary determines otherwise, not less than ten-percent (10%) of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by Section 8(d) of the Small Business Act (15 U.S.C. Section 637(d)) and relevant subcontracting regulations promulgated pursuant thereto.

First and foremost, let us clearly understand one thing. This program works. Today, DBE/WBE companies are in existence which would not be were it not for this program or its precursor. People may disagree as the "intent" of the program, but the bottom line is new DBE business have been a direct result of the mandates of Sec. 105(f).

However, though Sec. 105(f) has been relatively successful, it is not without its critics and modulating its problems is not without its challenges. Some of the problems are intrinsic, due to the nature of the program, but others are extrinsic, due to the nature of man. The latter of the two is by far the more difficult to eradicate, which is to say that though the program may be ailing the illness is not mortal.

I come before you today, recognizing the fact that one can either be part of the problem or part of the solution to said problems. I am of the opinion it is within the purview of those involved and incumbent upon the same to present ideas and methods to improve the perceived and real problem areas of the program. This philosophy has led me to not only join my state and national trade associations, the American Traffic Safety Association (ATSSA), but also to serve as chairman of the DBE/WBE Committee. ATSSA is testifying here today, but I feel that due to the personal nature of my experience with this program I have to present my case for myself.

The combination of my personal involvement and my chairmanship of the DBE/WBE Committee have propelled me into an indepth study of the effects of STAA. I am totally committed to the philosophy I believe to be inherent in Sec. 105(f). I emphatically affirm the need for assistance to DBE firms. Having participated in and scrutinized the many aspects of the program, I invite your attention to certain key issues.

To begin, let us look at the certification/decertification dilemma. I believe it would behoove the powers that be to consider a national standard of certification/decertification. Some states have no program whatsoever. Others range from the very simply to the complex. What is needed is a system which is uniform, stringent, broadbased, and mandates states to require the following:

1) A revised definition of clarification of the term "economically disadvantaged". As it stands now, a man who is socially disadvantaged as per the SBA definition may not necessarily be economically disadvantaged. As the law reads, one must be both socially and economically disadvantaged to participate in the program. States look

closely at the social aspect but tend to neglect the economic aspect except as it concerns fronts and frauds. The SBA guideline which shows $17,000,000 as an exit level is somewhat unrealistic, but the problem is that the $17,000,000 acts as an entry level for the program as well, having no other guideline. I recommend that:

a. No one with a personal net worth of $100,000 or more be allowed to enter the program.

b. No DBE company already in existence with a net worth of $300,000 or more be allowed to enter the program.

2) A comprehensive application which includes financial records, ownership documentation with stock certificates, corporate/propietorship papers, office space, list of equipment owned, proof of property ownership or lease, list of personnel, banking information, list of customers, and list of recent, past, present and future projects with dollar amounts.

3) Yearly review of all certifications.

4) Active pursuit of investigations into front or sham companies with the purpose of their decertification and or prosecution.

5) Certification that the minority persons are actually the driving force managing the company on a full-time basis.

6) Institution of follow-up program for the purpose of certifying that DBE's are preforming to the standard expected by the state. (ie. consultants and resident engineers could record timeliness, proficiency and capacity of DBE's with a modicum of added effort).

Such a program could effectively prevent many of the problems experienced in the overall program. While some states have begun to tighten their certification procedures, more must be done, and I believe that only a national certification program will guarantee uniformity.

Another major concern of the program is fronts or frauds. Fronts and frauds must be prevented or eradicated. As indicated above, a sound, stringent certification program will eliminate most fronts, but the ones which slip through the cracks can debilitate the program. We must use all the resources at hand to remove these insidious blights from the program. Surgery of the highest order is definitely required. I recommend the following:

1) A constant review of all DBE's.
2) A close scruting of all mentor-protege' relationships or split-ownership companies.
3) A fraud law in each state commensurate with federal laws concerning deception relative to DBE certification. (Illinois now has a law making this a Class 2 felony.)
4) Decertification of existing fronts with punishment inclusive of their exclusion from the bid process for a definite or indefinite period and/or fines.

Looking farther, bonding and financing continue to be problematical for DBE's. I realize that the recent GAO Report states bonding and financing were relatively inconsequential problems as indicated by their survey. From my perspective, the sampling taken was somewhat unrepresentative. The problem is that bonding and financing institutions like to see a track record in place. If one can prove he does not need it, he can have it. I, like others have no easy solution for this problem, but I am certain that what has been is inadequate. One possible solution may be in the establishment of a solid mentor/protege' program, which is to be discussed later. Government programs would be very beneficial in this area:

1) First, DBE's should be made aware of programs now in existence so they can be fully utilized.
2) Second, federal funds should be used to set programs for bonding and financing in place while granting credit to states for the administration

of the programs.

Furthermore, it could be recommended to the states that the matter of bonding and financing could be facilitated by granting the prime contractor credits of 1 or 2 percent for:

1) Furnishing bonding for DBE's with the DBE to pay his proportional cost as a deduction from the contract amount (a present industry practice).
2) Furnishing monies to DBE's for daily expenses providing there is adequate documentation of needs and disbursements with all expenses incurred to be paid from contractual amounts due.

Much has been written and uttered with regard to the so-called increased costs due to the use of DBE's. I recognize the necessity of constraints in this area, but the problem should be clearly understood. Some minorities or would-be DBE's are deliberately gouging the state or prime contractors. These are they who are in it just to make a fast buck. Others do not understand the bidding process and therefore overbid or underbid. Still others know their costs pretty well and acknowledge as follows:

1) DBE's pay more for goods and materials than non-minorities and primes. This fact is as much a result of the lack of a track record or volume buying as anything else.
2) DBE's do not receive monies for 2-6 months or longer after the project begins. Thus, they have to borrow money at prime or better to have working capital, if they can find it. Most DBE's do not even know when estimates are made or how to force the primes to pay them. Those who are knowledgable hesitate for fear of reprisals from the primes.
3) DBE's lose discounts for early payment of invoices from supplies due to a shortage of capital and the delay in receipt of funds.

Therefore, I recommend the following:

1) Bids from DBE's be allowed to be 10-15% higher than non-minority bids.

2) A provision be mandated on the state level which ensures the DBE will be paid 25% of his total contract in the first estimate to be paid as a mobilization.

3) A provision be mandated to force the prime contractor to pay the DBE as soon as he receives the money... DBE's now at the whim of the prime.

It must be recognized that any program carries with it a price tag. So, it is understandable that the mandates of Sec. 105(f) of necessity add something to the cost of highway construction. If one looks closely, however, the benefits in incresed employment and lower welfare costs would seem to offset these laments.

As an adjunct to the above, DBE performance and availability is often scrutinized and found to be inadequate. I readily acknowledge that these problems disrupt the totality of the program. Said deficiencies erode the credibility of legitimate, productive DBE's while both issues can cost the prime and the state time and money. However, I am proof positive DBE's are capable of participating in the highway construction program. I feel that the 10% requirement is burdensome at times and totally unrealistic at other times, when applied to certain projects. It is my understanding, though, that this program has goals, not quotas.

Therefore I recommend:

1) That DBE's must be required to perform as per the standard of the industry or be dropped from the program.

2) The the review mentioned in the certification procedures by strictly enforced.

3) That the waver process already in place be utilized fully with great care taken to assure the prime has truly made a good faith effort to meet his goal.

We must remember, however, that DBE's more than likely do not come to the program with a wealth of expertise. Where help is required, it should, must be forthcoming.

Yet another area which has not adequately been developed in this program is that of training. I believe training and technical assistance are important to the success of the program. In order to help DBE's better manage their resources and to provide technical assistance, industry training programs and mentor/protege' relationships should be fostered. Though these programs would be voluntary, they would not relieve the federal government of its responsibility because in the least financial assistance would be necessary if not more. An excellent example of such industry training programs is the DBE/WBE Management Training Program jointly sponsored by Indiana Contractors, Inc., the Indiana Department of Highways, and the Indiana Contractors Educational Center, Inc. The ten (10) week program, financed by a $75,000.00 grant form the FHWA is described as a "sound, legitimate, long range answer" to problems resulting for Sec. 105(f). It should be noted here that this program is federally financed, and I believe rightly so. I also believe the state should be granted credit toward its goal for administering such a program.

Congruently, I view the mentor/protege' program as a vehicle for providing guidance, capital, and training to DBE's so that they may ultimately become self-sustaining. This program could be the definitive answer to many of the problems already discussed. As proposed by W.B. Patterson of Patterson Enterprises, Ltd.,

> This program should recognize the strengths and weaknesses, of the DBE and include specific assistance programs to bring the DBE up to a competitive level in each deficient area.

Yet, having studied both Patterson's plan and the proposed guidelines for a mentor/protege' program of FHWA, which is basically excellent, I see a portent for problems and recommend as follows:

1) A certification program must first be in place and only certified "developing and emerging" companies should be considered.

2) No established company should be allowed to set up a mentor/protege'

program with his wife.

3) Prime contractors should be required to establish the mentor/protege' relationship in their area of expertise.

4) Incentives must be established to make the program viable for prime contractors:

   a. The prime should be allowed to count his particitpation as two-fold.

   b. The prime should be allowed federal tax credits for every year he participates equal to the amount of money lost by giving up his work with a little something for his trouble.

As you see, with these provisions, the program can offer a little something to all concerned.

One of the extremely detrimental aspects of the implementation of the program is the matter of the disproportionate effect on non-minority specialty contractors. I recognize the fact that some non-minority specialty contractors are truly feeling the brunt of this program. Sec. 105(f) was originally designed to apply to the width and breadth of the highway construction industry from engineering to consulting to construction. However, what has occurred is that prime contractors are using the specialty contractors to meet their total percentage requirement. Therefore, some non-minority specialty contractors are experiencing a 100% goal in some instances. Some tried and true companies are being forced into bankruptcy.

Such was not the intent of Sec. 105(f). What we have are prime contractors who, for the most part, are conducting business as usual. They have consistently subcontracted specialty items and they continue to do so. The prime contractor may cry foul, but except where he was accustomed to doing all of the specialty items in house, he has given up very little. Of course, as it is true that all generalities are lies, so it is that the foregoing is not true across the board. As discussed under mentor/protege', what is needed are incentives to invite the prime to seek DBE's in other than specialty areas.

It is my opinion here that "fear rules the land", to use the words of Alan Paton in his book, Cry the Beloved Country. Some non-minorities are being hurt, but that is not the rule. What prevails herein is the perception that if this program is not ended, it will put all non-minority specialty contractors out of business... a totally unrealistic, reactionary postulate. I am told repeatedly by non-minority specialty contractors to assuage my concerns that "without this program 'good' minority companies will survive". Why then is it not safe to say that "with this program the'good' non-minority companies will survive". We can co-exist. We can all share in the wealth of this great country. Those in trouble should receive aid, yes, but the integrity of this program must be maintained.

Finally, many prime contractors in concert with many supplies, promulgate that all DBE's should be prequalified. What a fiasco that would be! It would most certainly sound the death knell for STAA, Sec. 105(f). The fact is that most DBE's bid as subcontractors in highway construction rather than primes. Many states if not all require prequalification for primes. The excessive cost of becoming involved in the work usually done by primes is very prohibitive. Also, most DBE's cannot meet state specifications which require that a prime must do at least 50% of the work on a given contract. In addition, the rules state that an asphalt or concrete prime must own an asphalt plant or concrete batch plant. How does the new kid on the block come by one of these? The only way I can suggest to have more DBE's bid as primes is to use more set asides and recommend that states wave the above requirements.

In conclusion, there have been times in our lives when each of us has given another a headstart because we recognized that he did not have our aptitude, ability, or capacity. We thought nothing of this... primarily because it cost us very little and it was usually in the interest of fair play. We are, most of us, "do-gooders", people who act on the behalf of others so we can feel good about ourselves. Now we have an opportunity to be "good-doers", to allow those deserving an opportunity to catch up, to bridge a gap not of their own making. However, this time it cost something... something many of us are not willing to pay. If it was right then, it is right now. There are times in life when we must do things just because it is right that they be done. I believe this program was an attempt by those in power to right a long standing wrong. We are talking about something which is larger than dollars and cents, larger than our individual concerns. Whatever can be said against this program is insufficient. It has been too long coming; there is just too much to be overcome. The time comes when we must reach for the seemingly impossible, and the last 4 years has shown us that it is possible. Therefore, I bessech you to extend this program... modify it where necessary but extend it. One day it may no longer be necessary - I sincerely hope so. But that day is not today.

Testimony of
The Association of Business and Professional
Women in Construction
Pennsylvania Chapter
Presented to the
Sub-committee on Transportation
of the
Committee on Environment and Transportation
United States Senate
November 19, 1985

Regarding
Disadvantage Business Enterprise
And The Roll Women Business Enterprise
Should Play in the Program

99th Congress
First Session

The Association of Business and Professional Women in Construction is very concerned about the unfairness of the Disadvantage Business Enterprise Program. We feel the program has adversely impacted the Women Business Enterprise Program and is doing exactly the reverse of its intent.

Section 105(f) of the Surface Transportation Act of 1982 provides as follows:

> Except to the extent that the Secretary determines otherwise, not less than 10 percentum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act [15 USC section 687(d)] and relevant subcontracting regulations promulgated pursuant thereto.

Section 105(f) has been in effect for approximately three (3) years. It has had a significant impact on the WBE Program. It has stunted the growth of the WBE Program and has basically eliminated WBE's from the competitive market place.

Before the DBE Program was passed in the STAA, most states had established a 3-5% goals for MBE and WBE, but with the enactment of the DBE Program in 1983 the percentages of the WBE contracts have levelled off to approximately 2.5% and the DBE contracts have had a 11% increase.

In 1982, before the enactment of section 105(f), WBE's contracts were 237.6 million with a national average of 2.5%. The MBE's contracts were 415 million with a national average of 5%. In 1984, after the enactment of the DBE Program, WBE's total contracts were 295 million or a 2% overall average and the DBE contracts were 1.264 billion with a 13% overall average.

| | WBE CONTRACTS | | DBE CONTRACTS | |
|---|---|---|---|---|
| 1982 | 237.6 million | 2.5% | 415 million | 5% |
| 1984 | 295 million | 2% | 1.264 billion | 13% |

In other words before the enactment of section 105(f), the difference between the two programs was approximately 2.5%. Since the enactment of section 105(f), the difference between the two programs is 11%.

There has not been a significant percentage growth in the WBE Program since its conception; however, there has been a tremendous percentage growth in the DBE Program. This does not seem fair if the original purpose of the Federal Highway Administration's MBE/WBE Program was to help socially and economically disadvantaged individuals have an equal access to the highway construction market place.

The invention of the DBE Program which excludes women has almost eliminated Women Businesses from the opportunity to grow and compete equally in the highway construction industry.

If one was to try and interpret the intent of Congress in passing section 105(f), one might deduct that Congress intended to help those individuals who historically have been deprived equal opportunity to compete in the economic arena, because of past social standards. If that was the intent of Congress in passing section 105(f), then women should definitely be included in the DBE Program.

Even though there are those individuals who feel women are not socially and economically deprived, history has proven otherwise. Women have had to struggle throughout American history for equality. The Constitution and the Bill of Rights apparently resolved all questions regarding the civil rights of man; however, the interpretation of "man" was taken literally by the men in power and that absurd attitude kept women from exercising their civil rights for hundreds of years. Even with the enactment of the fourteenth amendment in 1868 which promised all American citizens equal protection under the law, and no citizen be deprived of their constitutional rights, women still had to fight for equality.

Before the nineteenth amendment was passed in 1920, the extension of voting rights had guaranteed the franchise for all American men, but not women. Even after the passage of the nineteenth amendment women still remained powerless observers of the political scene until recent years.

Full equality under the law for American women moved closer to reality in 1972 when Congress passed the Equal Rights Amendment. Under the ERA "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex". Even though the Equal Rights Amendment was not adopted by the majority of the states, its passage by the U. S. Congress indicates Congress's recognition that women as a group have been historically, socially and economically deprived.

The latest Department of Commerce statistics indicates that

42% of all families have a single parent as head of the household, 90% of that 42% are women. Women as head of household account for the largest percentage of low income families, as well as, the largest group in the low income bracket.

Women earn 40% less than men working in the same job or a job of equal value. Most women cannot receive a major loan without her father or husband co-signing the loan, even if she owns the business.

In the corporate world men in management positions have a 9 to 1 ratio even though the work force for men and women are about equal.

The Association of Business and Professional Women in Construction is in support of the intent of section 105(f) of the STAA which aims to provide equal opportunity to all Americans to compete in the economic arena. It is obvious from the Federal Highway Administration figures that a portion of America's disadvantage firms are being assisted. Also it is no doubt that there are new disadvantage businessess in existence today because of the DBE Program. However, we strongly urge that section 105(f) be amended to include women. The inclusion of WBE's should also come with other strong mandates to insure that the truly needy MBE/WBE firms become self-supporting members of the business community, but without adversely harming the non-participants in this program.

We recommend the following to amend section 105(f) of STAA:

1. Women should be included in the DBE Program.
2. The amended percentum should be increased to 13%. This percentum would encompass the present DBE

goal and the state's WBE goal.

3. There should be a strong uniform certification and decertification program to ensure that fronts and shams could not exist. This uniform and strigent certification/decertification should require the following:
   a. A comprehensive application which includes financial records, ownership documentation with stock certificates, corporate/proprietorship papers, office space, warehouse space, list of equipment owned, list of personnel, banking information, list of customers, and list of recent, past, present and future projects with dollar amounts.
   b. Yearly review of all certifications.
   c. Active pursuit of investigations into front or sham companies with the purpose of their decertification and state prosecution.
   d. Certification that the minority/women persons are actually the driving force managing the company on a full-time basis.
   e. Institution of follow-up program for the purpose of certifying that DBE's are performing to the standard expected by the state. If they do not perform to the standards they should be decertified until they can perform to state standards.
4. The U. S. Congress should mandate that all DBE/WBE

firms participating on Federal aid highway projects be certified in some form of recognized certification, education and training programs. Since many of the DBE/WBE firms are small speciality firms engaging in highway safety areas, it is important for the protection of American lives that they be capable in performing their jobs.

One of the major complaints from contractors is that there is not enough legitimate minority businesses to meet the DBE goal. Another complaint of the contractors is that because there is a lack of DBE firms to meet the 10% goal, the competitive bidding system is being destroyed. Of course when there is a lack of competition, the prices for the bid items are higher. The contractors' associations have suggested that figure is in excess of 10.7%

We feel by adding WBE firms to the DBE Program it will help to alleviate some of the major concerns of the contractors. By adding WBE firms to the program it will increase the potential numbers of available firms making it easier for contractors to meet DBE goals. Also with more firms participating the competitive bidding process will work more accurately and open competition means lower prices for the bid items.

If the intent of 105(f) is to afford economically and socially disadvantage individuals the chance to have an equal opportunity to obtain the American dream, then women with their long history for the struggle of equality should certainly be a part of that dream.

Remarks of John C. Vande Velde, Vice President, Warning Lites of Illinois, Inc., United Subcontractors of Illinois, Vice Chairman, Statewide Transportation Alliance of Associations.

Accompanied by Kathleen M. Buck Holst, Vice President, Warning Lites of Illinois, Inc. Vice President, United Subcontractors of Illinois.

Presented to the Subcommittee on Transportation, U.S. Senate Committee on Public Works, November 19, 1985, 10 a.m., 406 Dirksen Office Building, Washington, D.C. 20510

My name is John Vande Velde, marketing vice president of Warning Lites of Illinois, Inc., a traffic protection sub-contractor in Illinois. I am also the President of United Subcontractors of Illinois (USI), an association formed to promote the welfare of specialty contractors from every facet of the road construction industry in Illinois and throughout the nation. In addition, I hold the office of Vice Chairman of the Statewide Transportation Alliance of Associations (STAA), an organization comprised of seven highway contractor associations in Illinois. STAA was formed to address the problems of Section 105(f) of the Surface Transportation Assistance Act of 1982 using the support of some 300 contractors and 600 sub-contractors.

First of all, I would like to thank you, Mr. Chairman and members of the Subcommittee on Transportation for allowing me the opportunity to present our views. I represent an array of businesses in the road construction industry. Ninety-five percent are small, family-owned businesses. Most have seven or less full-time employees. Our work lies within a fifty mile radius of our home office. And, most are strictly highway contractors, i.e., we depend on tax dollars for ninety percent of our work. These funds come under the jurisdiction of Section 105(f) and the disadvantaged business mandate.

Section 105(f) of the 1982 Surface Transportation Assistance Act requires that at least ten percent (10%) of the Act's funds be expended with business concerns owned by specially designated minority group members, or "Disadvantaged Business Enterprises"

(DBE's), to the exclusion of all other bidders. The individuals I represent here today oppose this mandate due to the detrimental effects it has had on our industry. It is harmful in highway construction, and environment which does not lend itself to a large or significant amount of subcontracting. Contrary to building construction, where almost all work is subcontracted, in highway construction, on the average, ninety percent of a typical contract is performed by the prime contractor's own work force, leaving only ten percent available for subcontract.

The result is that under Section 105(f) to subcontract ten percent of the amount of the highway contract to a Disadvantaged Business Enterprise (DBE), and with only ten percent available to sub-contract, prime contractors on highway construction jobs are being forced to award one hundred percent of that subcontract work to minority firms, to the harmful exclusion of non-minority subcontracting firms, like Warning Lites of Illinois. No longer are prime contractors able to award decisions solely on the basis of lowest price, or merit, or competence, or any other pertinent factor, but must, in fact, award on the basis of whether the firm is "owned" and "controlled" by individuals who meet the racial definition required by Section 105(f).

It has been documented that in many states the ten percent mandate exceeds the minority population percentage. In fact, when the bill was introduced, there were less than three percent minority highway contractors nationwide. However, in order to meet the "quota", illegal shams and fronts are established, brokerage-type firms that receive the contract award but serve no commercially useful function. Non-minority firms are forced to perform the work for the shams or perform no work at all.

In Illinois, for example, the Special Assistant to the Secretary of Transportation stated that only forty percent of the certified DBE's in Illinois are legitimate firms. In Arizona, the Transportation Director stated that twenty-five percent of Arizona-certified DBE's are not even Arizona-based firms. And typically, we find that the shams and fronts are owned by individuals who are members of a racial minority group, but who are in no way economically disadvantaged. No guidelines have ever been implemented to define a true disadvantaged minority.

As such, in the words of Ray Barnhart, Administrator of the Federal Highway Department, the program has been "misused" and "misdirected." And the result of this, we feel, is discrimination, discrimination against non-minorities. The highway construction industry is now forced to operate under regulations which, in fact, prohibit non-minorities from competing equally with minorites.

In the words of Doug Pitcok, past president of the Associated General Contractors of America, the DBE program is "morally wrong and legally wrong because highway contractors now don't want bids from white subcontractors. (They) throw them in the wastebasket."

The program has eliminated free enterprise! In essence, non-minorities are being punished, punished for the societal discrimination that has for centuries plagued the racial minority members. We have not, however, been found guilty of such discrimination. There has been no due process of law. We have been sentenced, yet we were never tried. And, according to Congressman

James Moody, of the fifth district of Wisconsin, in a September 30, 1985, letter to the executive director of the Wisconsin Road Builders Association, (see exhibit 1) "...discrimination against non-minority contractors--specialty or otherwise--is exactly what was intended by (the DBE program)." Need I say more...?

Throughout the twenty-nine years of Warning Lites' operations, we have conquered many obstacles, obstacles within our organization and obstacles imposed upon us by outside factions. When the economy plummeted and interest rates soared, we paid the price, and we survived. When federal highway funds were held back from our industry and work dropped, we waited. We employed, and, we again survived. We survived the union involvement. We survived the loss of key personnel in our small company. And, we survived the price of growth. But, we cannot survive the effects of the DBE program. In comparison, those other obstacles were merely forks in the road. The 105(f) mandate is, for us, a dead end street.

Even prior to 1982, back when the minority program was first introduced, Warning Lites felt the effects of such legislated discrimination. In 1977, we created a minority-owned company with an existing vice president who just so happened to be a minority (but definitely not disadvantaged). Within one year, we saw approximately sixty percent of state contract work that would have been awarded to Warning Lites go to our minority business. At that point, Warning Lites still received benefits of the work. However, in 1979, since Warning Lites was only forty-nine percent owner, and the vice president was the majority shareholder, the company was dissolved when the vice president decided to become a one-hundred percent owner of his own minority business enterprise. With him, went virtually all our state work. We survived back then because the quotas were still tolerable. What is now ten percent was then only two percent.

Then, between 1980 and 1982, the quotas rose to four percent and up to fifteen percent in the City of Chicago. We felt the strain and in another attempt to survive, we applied for and were granted certification as a Women Business Enterprise (WBE). Warning Lites was and still is owned an operated by a women. However, once again we lost when, for bogus reasons, it was determined that our woman was not "socially and economically disadvantaged" and we were, therefore, decertified.

Possibly the greatest risk Warning Lites has ever taken to survive under the regulations occurred in late 1982 when we began assisting a DBE firm in a "mentor-protege"-type association. Our representative taught the DBE owner the bidding process. We made our equipment available to him. Our employees became his employees. His accounting and tax records were maintained using our computer equipment and our personnel. And, we turned over our customers to this competitor. What would undoubtedly have amounted to $3,500,000 in contracts in 1984 to Warning Lites if there was no DBE program, was awarded to "our DBE." We survived because the equipment the DBE used in contract performance was leased from us. And then, again, the crisis came. A state investigation was performed covering our relationship. Fraudulent activities with sham fronts were prevalent nation-wide. And although we were found guilty of no wrong doing by the state and were legally advised that we were well within the federal guidelines, we felt the risk too great. It was not worth hurting our reputation or, even worse, losing our business. So our association was terminated. The result on Warning Lites: a ninety percent decrease in state and city contract work has been suffered during 1985.

We learned many things during our association with the DBE. For example, regarding the bidding process, the DBE got calls back from the prime contractor to fill their quota. We did not then, and we do not now. On the average, during 1984, our bid prices were seven percent lower than the DBE's. However, the low bidder was not awarded the contract in most of the instances. Every contract where both Warning Lites and the DBE bid, Warning Lites was low. In 1984, we bid $8,000,000 of a possible $30,000,000 of work. Historically, we received forty to fifty percent of the contracts we bid. But, in 1984, we received only $350,000, or four percent. And, in every case, we were low. We learned we could no longer compete equally. We had the best prices for reputable service. Yet, we could not work. And 1985 has only proven worse. This year, our success rate is down to three percent.

Warning Lites lives by the Equal Employment Opportunity mandate required. Of approximately sixty employees during our peak season, forty-two percent are minorities. We have never argued the issue of EEO. Now, however, some of our minority employees have had to be laid off. They are still not working, let alone in the construction industry for a DBE. If the intent of Section 105(f) was to provide work for more minorities, as was stated by supporters of the bill, then the program has failed. In our experience it has provided fewer.

There are a few minorities who have benefitted by the program. We do not refute that. Judging from the line of minorities camped at Warning Lites' door proposing we use them to set up a front, some people undoubtedly have become wealthy using this program. In fact, individuals from four states, three racial minority groups and all walks of life, have asked the question of Warning Lites. One even went so far as to put it in writing (see Exhibit 2). Another suggested that we could work out an arrangement with her, a qualified DBE/WBE, but it would cost us less money if we teamed up with a new DBE/WBE she was backing. In every case, the DBE entrepreneur requested five to ten percent of the gross as their "fee". Also in every case, Warning Lites, of course, would perform the work, using all of our own equipment, and paying all the bills. Yes, some have benefitted...!

Your ten percent quota has been achieved and even exceeded. But, it has not been achieved in a legal manner by legal, certified DBE's. It has been our experience that virtually all non-minority specialty contractors who have wanted to stay in business have been forced to "team up with" a DBE. In a STAA meeting with Senator Symms' aid, Taylor Bowlden, in which the six states from region five were represented, we openly admitted that these preposterous relationships exist.

USI has put forth great efforts to convince non-minority sub-contractors that to perform the work for a non-qualified DBE will, in the long run, be to their detriment, both legally and in a business sense. STAA has also supported this effort. And, we know that if such illegal arrangements did not exist, your quota would not be met.

The quota was excluded from the Defense Department's regulations and the EPA's regulations. We want it excluded from ours.

This DBE program continues to snowball to what we believe to be unreasonable extremes. The City of Chicago's quota in highway construction is now 35%. Cook County in Illinois requires 30%. Even Illinois counties with virtually no minority population mandate 10%. It has become politically fashionable to incorporate racial preference programs in federal, state, and local government regulations. Discrimination against racial majority groups is now prevalent. All we want is free trade, equal rights, and fair competition.

As has been presented here, Section 105(f) was enacted without a true understanding of the highway construction business or the availability of qualified DBE firms. Problems such as project delays and extra costs (documented by the General Accounting Office in its study of ten percent DBE requirements) are being encountered. Because of the manner in which the Department of Transportation is dictating that the states implement the program, contractors must meet or exceed DBE goals before they will be awarded the contract. That is, Section 105(f) is being implemented as a quota program. The result is that many non-minority specialty contractors are being forced out of business. An entire group of non-minority contractors are being systematically excluded from the right to participate in that type of work which has provided their livelihood and the livelihood of their employees for years.

In conclusion, what I and my associates are asking, is to once again be able to compete in a free enterprise system, to be able to perform a fair service for a fair price. As a member of the 1968 and 1972 U. S. Olympic teams, I know what competition is. I am not afraid of it. I made those teams on an equal opportunity basis because I was the best. I worked hard. I gave up a lot of activities that youths normally enjoy. And, I competed. Now, for the first time, no matter how hard I and my company work, we cannot prosper because of this law. It leaves us very few alternatives; we either entertain the possibility of establishing a phony minority company or we go out business. We needed no preference program to establish ourselves almost thirty years ago. We made it with hard work. All we want is the opportunity to continue that same way.

Mr. Chairman, that concludes my remarks. Again, thank you all for the opportunity to present my testimony on an issue of such significant importance to myself and all members of the highway construction industry.

EXHIBIT 1

BONNIE'S
BARRICADES

1541 Michigan St.
Des Moines, IA 50314
Phone (515) 282-8877

October 30, 1985

Mr. John Vande Velde
Warning Lites of Illinois
844 Kay Avenue
Addison, Illinois 60101

Dear Mr. Vande Velde:

As you probably already know, I am the owner of a newly organized WBE certified traffic control company in Des Moines. I have been contacted by many contractors requesting traffic control quotes on work being let November 5, 1985 in Black Hawk County.

I believe that I have been asked to quote because of my WBE status. There are WBE goals on some of these jobs. I would like to cooperate with Warning Lites of Iowa (Ron Tyrrell) on these jobs. Specifically, I would like a price from WLI for renting the items necessary to do the jobs. If I get the work, my Company will come to Waterloo for all major set-ups, stage changes and removals. I would ask Ron to provide any minor, routine maintenance. Obviously, I can't economically drive to Waterloo for a small repair item. I will state in my quotes that the contractor will be responsible for arrowboard fuel and insurance, and so forth.

Mr. Vande Velde, I think the chances of my getting any of these jobs are very slim. I am quoting them only because I hope to do some work with some of these contractors in the Des Moines area and, being new, I don't want to start a new season refusing to quote. Also, I do not want to take work away from WLI. That is why I want a price from Ron.

I value my association with WLI and am anxious to continue that association.

Please call if you have any questions about my request. Otherwise, I hope to hear from Ron as soon as possible.

Sincerely,
BONNIE'S Barricades, Inc.
Bonnie Ruggless
Bonnie J. Ruggless
President

CC:Ron Tyrrell

EXHIBIT 2

5TH DISTRICT
WISCONSIN

COMMITTEES:
PUBLIC WORKS AND
TRANSPORTATION

INTERIOR AND
INSULAR AFFAIRS

Congress of the United States
House of Representatives
Washington, D.C. 20515

1721 LONGWORTH BUILDING
WASHINGTON DC 20515
(202) 225 3571

DISTRICT OFFICE
135 WEST WELLS ST
ROOM #618
MILWAUKEE, WI 53203
(414) 291-1331

September 30, 1985

Mr. H. A. Lindberg
Executive Director
Wisconsin Road Builders Association
44 East Mifflin Street
Suite 401
Madison, Wisconsin 53703

Dear Friend:

Thank you for writing to tell me your views on the disadvantaged business provisions of H.R. 3129, the 1985 Federal highway bill.

As you may know, I am one of the sponsors of H.R. 3129, and I support the intent of the disadvantaged business enterprise provisions of the bill. However, I am not opposed to improving any bill, if I can be convinced of the necessity of doing so. In this particular instance, you say that the lack of bona fide disadvantaged business firms has caused all kinds of problems and is discriminatory, but you provide no facts in support of this. I would appreciate any information in support of your contention you could provide me. I will say, however, that discrimination against non-minority contractors — speciality or otherwise — is exactly what was intended by this provision. It is intended to ensure that, for whatever reason, the disadvantaged business community will not be discriminated against in the highway construction sector, at least to the extent of 10 percent of the designated funds. In principle, I continue to support this concept. However, if there are legitimate, non-discriminatory ways of improving the operation of the program, I would be pleased to press for their adoption.

My office has contacted Representative Sundquist's office to obtain copies of his proposed amendment, and was informed that, at this time they have not settled on any language at all, nor do they have any knowledge of any proposal to prequalify all contractors, but they promised to keep us informed. I will follow this closely to see what they come up with and if I can support it.

I would appreciate receiving any relevant, specific information you could provide that would shed light on how the program is, as you put it, causing "all kinds of problems," as well as what you or others propose that might be done to improve it. I do want to thank you for taking the time to tell me about the Association's views.

~~Sincerely,~~

Jim

Jim Moody
Member of Congress

JM/tk

AMERICAN TRAFFIC SAFETY SERVICES ASSOCIATION, INC.
408 WESTWOOD OFFICE PARK
FREDERICKSBURG, VIRGINIA 22401
(703) 371-8800

STATEMENT

OF THE

AMERICAN TRAFFIC SAFETY SERVICES ASSOCIATION

TO THE

SUBCOMMITTEE ON TRANSPORTATION

OF THE

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

PRESENTED

NOVEMBER 19, 1985

99TH CONGRESS
FIRST SESSION

## Statement of the

## American Traffic Safety Services Association

My name is Jeff Roehm, and I am presenting testimony today as Traffic Services Division President of the American Traffic Safety Services Association (ATSSA).

The American Traffic Safety Services Association (ATSSA) is a national trade association in its 16th year representing the traffic safety industry. For the most part, ATSSA members are small family-owned businesses. We have a total of 279 member companies with offices in 481 locations in 46 states. Our members manufacture and install highway signs, pavement markings, construction zone devices, and other traffic safety devices. Twelve of our member companies are owned by minorities and 35 are owned by women.

Because highway prime contractors generally subcontract the traffic control portion of their work, there has been a tendency in many states to use this portion of the contract to satisfy at least part of the DBE goals as mandated by Section 105(f) of the Senate Transportation Assistance Act of 1982. This has resulted in extreme hardships for nonminority traffic service companies in some states.

However, as an industry, we have worked very hard over the past three years to make this program work. We established a DBE/WBE committee within ATSSA and have studied the program extensively. We participated in all seven regional conferences conducted last year by FHWA and met with the Federal Highway Administrator and other FHWA representatives numerous times. We have testified before the House Surface Transportation Subcommittee and the Senate Transportation Subcommittee in 1984 and again this year. We participated in the GAO Study conducted last year and are cooperating in the study now being conducted by ABT Associates for FHWA.

It is our feeling, after listening to testimony and reading a myriad of reports and regulations which govern this legislation, that the best solution to the problems created by the program would be for Congress to start all over with a new and more workable plan. Knowing the political realities, however, we realize the improbability of this and would like to recommend the following modifications which, if implemented, could make the program work better.

### 1. Disproportionate Effects on Specialty Contractors

As a result of the way Section 105(f) of the STAA is being administered, a serious adverse effect is being felt by small companies in certain specialized areas. Small industries such as traffic control, landscaping, guardrail erection, hauling, and pavement marking are being used by prime contractors not only to meet but also to fill their 10% goals. In some instances these specialty contractors are experiencing 100% of the requirement, and oftentimes nonminority specialty contractors are excluded from even being considered for these subcontracts.

In order to insure that the goal of equal opportunity is met and that the burden of such an effort does not fall unduly on particular segments of the highway construction industry, ATSSA recommends that there be a limit on the amount of work in each contracting area which may count toward the 10% goal. We recommend that no more than 15% of the work done by a particular segment of the industry be counted toward the DBE goal.

For example: Consider a state with an estimated annual highway construction program of $500 million. 10%, or $50 million, must be awarded to DBE's. Normally, about 3% of the construction dollar goes for traffic control which, in this example, would be $15 million. The proposed regulation would then require that after $2,250,000 (15% of $15 million) worth of traffic control items were awarded to DBE's, these items could no longer be counted towards meeting the goal. Traffic control could still be subcontracted to DBE companies; it simply could not be counted towards the goal.

Rationale:

(a) More minorities would necessarily become involved in the total scope of the work which is the ultimate goal of the program.

(b) Contractors would not be able to satisfy the goal by utilizing subcontractors in a few specialized areas.

(c) Minority contractors would be able to compete for portions of the work from which they are now being excluded. As it stands now, DBE's and non-DBE's in specific categories are competing for a percentage of a very small pie (10%).

The record keeping and reporting procedure for accomplishing this would not be as difficult as might be imagined. At the beginning of the year, states could easily estimate what their total program will be and, using past records, estimate what percentage of the total work will be in each contracting area, i.e., site preparation, excavation, hauling, concrete or asphalt paving, bridge construction, landscaping, traffic control, etc.

States now report monthly to FHWA on their DBE and WBE awards using form 1405, and they must break down the work into categories using code numbers. By modifying this form slightly, it would be fairly easy for both states and FHWA to keep track of the work awarded to DBE's and WBE's by type of work.

## 2. Definition of Economically Disadvantaged

The current DOT regulations require that an individual owner of a DBE firm must be determined to be first socially and then economically disadvantaged. Social disadvantage is determined primarily by the race of the applicant. It is with the economically disadvantaged determination that a problem exists. Only bona fide developing and emerging firms owned and controlled by truly socially and economically disadvantaged individuals who need assistance should be allowed to participate in the DBE program. It is clear that the intent of the law was not that people who are wealthy in their own right or successful in an area other than construction should benefit from this program. However, that is often the case.

We recommend that anyone having a net worth of more than $100,000 be determined not to be economically disadvantaged and not be allowed to enter the program. If an applicant firm has a minority owner or part owner whose net worth exceeds $100,000, that firm would be excluded from participation. This would be an entrance level requirement and, of course, if an owner were successful, he could make more than $100,000 after entering the program. The size of the business would determine the exit level.

### 3. Definition of Small Business

To avoid flagrant abuses and to protect those for whom the program was intended, a realistic gross dollar limit should be set for qualification as a small business as it relates to this program. Section 3 of the Small Business Act (13 CFR Part 121) sets size standards for small business. According to these standards, a business is considered small if it has under $17 million average annual receipts for Highway Construction (Major Group 16), $7 million for Special Trade Contractors (Major Group 17), and $3.5 million for Rental Companies (Group 7394). We think those figures are far too high and recommend that for the purposes of this program, all of the applicable SBA size standards be reduced by 1/2. In other words, Highway Construction would be $8.5 million, Special Trade Contractors would be $3.5 million, and Rental Companies would be $1.75 million. This should include the total receipts of all companies which have common ownership of any kind in order to prevent people from simply starting new companies. For some specialty industries, including ours, these standards would still be high but certainly much closer to reality for the highway construction industry.

### 4. Uniform Certification/Decertification Program

There has been a tremendous problem in the certification and decertification process used by the various states. Some seem to be very stringent in their certification requirements, while in other states it is a very simple and easy process to get certified as a DBE. We believe there is a need for a standard certification procedure which would be followed by all states. There must also be a stringent and uniform enforcement procedure to insure that each state require at least the following:

(a) A comprehensive, uniform application which includes financial records, ownership documentation, equipment and personnel information, and documentation of experience or training in a particular field.

(b) A review of all certifications at least annually.

(c) Very active investigations into suspected front and sham companies with the purpose being decertification and/or prosecution of those firms which are not legitimate DBE's.

(d) Documentation that the minority owners are actually managing and running the company on a full-time basis.

(e) Institution of follow-up programs for the purpose of certifying that the DBE's are performing work to the standard expected by the state.

Guidelines for DBE certification are clearly spelled out in a November 1983 FHWA memorandum from FHWA Administrator Ray Barnhart. These should be refined into a more specific standard form and procedure and all states required to adhere to them.

## 5. Waivers/Goals

In conjunction with strong certification/decertification regulations, there is an obligation to allow waivers where necessary. There is a tendency on the part of some states to set goals for specific projects in an arbitrary manner. If the provisions of 105(f) entails goals rather than quotas, then where there is no interest by DBE's, for whatever reason, states should consider the granting of waivers both for the entire program and for individual projects, providing the prime contractors have met all the requirements and made a good faith effort to find DBE's. Thorough analysis is needed to determine attainable participation, and this must be individualized on a state by state basis so that goals are appropriate with the availability of minority-owned companies and the minority population of that state. We further recommend:

(1) That the states be mandated to assess the availability of DBE's in the area of the project before establishing the goals for particular projects.

(2) That the states be mandated to carefully weigh the prime's good faith efforts.

(3) That the contractor be required to identify minority subcontractors in his bid. This would prevent "price shopping" after the letting.

## 6. Training and Education

We believe that one of the great deficiencies of this program is the complete lack of funding for training and education of minorities who may be making their first entry into the highway construction field. There have been very few privately funded training programs for DBE's. In our industry, ATSSA sponsors a very good technical training program and most new companies, both minority and nonminority, have received a great deal of assistance by having their key people go through this program. The ATSSA program is completely self-funding, and we continue to expand on it, but some new minority firms simply cannot afford even this nominal cost for technical training in the traffic control field. There needs to be some federal funding for similar training programs particularly in the areas of general business management, accounting, bidding procedures, etc. We recommend that a minimum of $5 million a year be authorized for training and education of DBE key personnel.

## 7. Mentor-Protege

ATSSA sees the mentor-protege program as a tool to provide the guidance, capital and training needed so that DBE's may ultimately become self-sustaining. We support the FHWA guidelines published January 25, 1985. We would add to these guidelines that mentors should only assist proteges in their own areas of expertise.

In spite of the availability of the mentor-protege program, it is clear that relatively few states are taking advantage of the program. Only nine states have adopted the guidelines, and within these nine states, very few, if any, actual mentor-protege relationships have been approved. It is obviously not working.

There is a potential here to assist developing and emerging minority-owned firms, but it seems that contractors are reluctant to participate. Perhaps this program could be more effective if some sort of financial incentives were provided to the prime contractors (mentors). We don't, however, have any specific recommendations.

## 8. Sunset Provision

Finally, although we support the intent of 105(f) which aims to provide equal opportunity to all Americans to compete in the economic arena, it is obvious from the testimony of all the contractors and other groups involved that there are tremendous problems with the program as it is now being administered. Anyone who says the program is working well is just not listening.

All of the people and groups complaining about this program are not racists. Most are simply individuals and businessmen who support equal opportunity for all Americans but who see their own businesses being unduly affected by a program that is not really accomplishing its goals. They see themselves and their colleagues being forced to find ways to circumvent the program in order to survive.

We have suggested some changes that, if implemented, will make the program work better and place less of a burden on the contracting and particularly the specialty subcontracting industry. If all of these changes cannot be implemented, we would make one last recommendation. That is, that the total program be phased out by gradually reducing the goal over four years to 8% the first year, 6% the second, 4% the third and 2% the fourth.

We appreciate the opportunity to present our views and urge this committee and the Senate to take positive action to make this program work or to phase it out and start fresh with a new program.

# TESTIMONY BY

DONALD H. MORSE, P.E.

CONTRACT ADMINISTRATION SUPERVISOR

IDAHO TRANSPORTATION DEPARTMENT

# ON IDAHO'S REVIEW OF SECTION 105(f) OF THE SURFACE TRANSPORTATION ASSISTANCE ACT (STAA) OF 1982

BEFORE THE TRANSPORTATION SUBCOMMITTEE OF THE

SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

WASHINGTON, D.C.

November 19, 1985

# STATEMENT OF
# DONALD H. MORSE, P.E.
# CONTRACT ADMINISTRATION SUPERVISOR
# IDAHO TRANSPORTATION DEPARTMENT

## INTRODUCTION

Thank you Mr. Chairman and members of the Committee. I am presenting testimony on behalf of Mr. E. Dean Tisdale, P.E., Director of the Idaho Transportation Department. As requested, I will provide an overview of Idaho's position on Section 105(f) of the Surface Transportation Assistance Act (STAA) of 1982. Information was obtained from personal knowledge of the program as well as discussions with Idaho's supportive services contractor and two chapters of the Associated General Contractors.

1. What is the capacity for DBE's and WBE's for highway construction work?

Idaho does not prequalify contractors. Licensing, by statute is performed by the Department of Public Works.

Capacities, as determined by that Department, are reflected in the class of license obtainable by any contractor. These classes are as follows:

> Class AAA License, for work the estimated cost or price of which exceeds $250,000.00.
>
> Class AAA or AA License, for work the estimated cost or price of which is not more than $250,000.00.

Class AAA, AA, or A License, for work the estimated cost or price of which is not more than $100,000.00.

Class AAA, AA, A, or B License, for work the estimated cost or price of which is not more than $50,000.00.

Class AAA, AA, A, B, or C License, for work the estimated cost or price of which is not more than $25,000.00.

The number of licensed firms currently certified as DBE and/or WBE fall into the following categories. For comparative purposes, all licensed contractors are also shown.

| Class of License | DBE/WBE Firms | All Firms |
|---|---|---|
| AAA | 25 | 1,191 |
| AA | 13 | 391 |
| A | 8 | 380 |
| B | 4 | 312 |
| C | 2 | 278 |
| TOTALS | 52 | 2,552 |

While this may not reflect the actual capacity of either group, it is the one measure available to us at present.

It should be noted that, of the 160 plus DBE/WBE firms certified by the Idaho Transportation Department, only 52 are licensed contractors in the State. Approximately 50% of the certified DBE/WBE firms are from out of state, and would attain Idaho licenses only if they contract work on an Idaho project. Additionally, a number of firms are involved in the supplier or service areas which do not require a public works license.

2(a). Currently, how many DBE/WBE's are bidding as prime contractors for highway construction work?

Six DBE/WBE firms bid as prime contractors. Of these, four were successful with their bids in recent years. Two were first-time prime contractors this past season. The most recent of these participated in Idaho's new program of requiring DBE/WBE prime contractors to perform the same good faith efforts required of non DBE/WBE firms.

2(b). How can more DBE/WBE firms be developed as prime contractors?

The major constraint on DBE/WBE firm development concerns the lack of liquid assets. This affects the ability to obtain both financing and bonding. While not peculiar to the DBE/WBE, it is prevalent throughout the program. Possible assistance would include continued efforts toward smaller contracts and liberalization of collateral requirements by bonding companies. For example, at present real estate is not considered an asset for bonding purposes.

Another area of development lies with the DBE/WBE firms themselves. Virtually every general contracting firm in practice today started as a small, speciality contractor. Expansion involved gradually widening their scope, at times stretching their abilities and financing. Though our discussion today centers on STAA '82, some aspects of this program date back to Public Works legislation in 1977. The general contracting community in our area believes there is a lack of this commitment to expand by many involved in this program. As a result of the program, they "must" be consulted and they are content with the relative security of their present level of expertise. It is also the general contractors' belief that our supportive service contractor has both the ability and the confidence of the DBE/WBE community to be of very real assistance in overcoming this apparent apathy.

3(a). What effect has the section 105(f) program had on non-minority specialty contractors and WBE's?

The introduction of additional firms into any area increases the competition and presumably would decrease the work available for previously established firms. Although we occasionally hear of specialty firms going out of business because of the intrusion of DBE/WBE firms, we have not yet had any such allegations documented. Unlike some states, Idaho does not require a prime contractor to accept a higher bid from a DBE/WBE just to make the contract goal. Competition in the market place is still believed to be fundamental. This lesson is as important as any other in this program. We have been told by prime contractors that they accepted a higher quotation from a DBE/WBE for this purpose. That was their choice to negate the need for other good faith efforts.

Further study in this area is being undertaken by the American Association of State Highway and Transportation Officials Task Force on Disadvantaged Business Enterprises.

4(a). What kind of certification process for DBE/WBE firms should be required?

The current recommendations in the Code of Federal Regulations 49-23 provide adequate guidelines for the states to develop procedures. A few minor clarifications would be helpful, including a clearer definition of commercially useful function, and a clearer acceptance or rejection of the "two headed firm" where one owner is the expert in business matters and the other the technical expert.

4(b). Should the process be uniform for all states?

Basic requirements as detailed in CFR 49-23 should be uniform for all states. Other requirements with respect to application questionnaires, on-site visits, make-up of the review team, monitoring, records, etc. should be left to the state's discretion. The needs and problems vary greatly across the country. This was evident at the recent Civil Rights Seminar at St. Paul, Minnesota. The methods needed in heavily populated states with large numbers of DBE/WBE firms would result in overkill and resentment in smaller states whose comparatively fewer firms are known on a first name basis. Although no formal program of reciprocity exists between states, we confer regularly with our counterparts in other states concerning their findings with respect to a particular firm.

5(a). What kinds of training, financial or other technical assistance are needed by DBE/WBE firms?

Idaho is comfortable with the services being provided by our supportive services contractor. This firm is charged with providing assistance to DBE/WBE businesses in the areas of financing, bonding, licensing, business planning, marketing, liaison with prime contractors, estimating, bidding, scheduling and record keeping. The supportive services contractor provides some of these services with its own staff, having specialists available to assist such as a bonding consultant and a banking consultant. Retired Idaho Transportation Department employees also serve as consultants in the areas of plan reading, material take-off, etc. All such services are provided free-of-charge to the DBE/WBE.

5(b). Should this kind of assistance qualify towards the ten percent goal?

Provision of this service should qualify toward the state's meeting its goal. STAA '82 funds are used to provide the program in Idaho now through the supportive services contract. Our present contractor is a DBE/WBE firm and Idaho claims credit for use of these funds for this purpose. Since the funds are being used for the direct benefit of DBE/WBE firms, credit should be allowed regardless of the status of the firm employed, if any, for this purpose.

6. What, if any, additional cost does the Section 105(f) program add to the Federal-aid highway program?

Certain costs can be attributed directly to the program. Our supportive services contract costs approximately $100,000 per year. Another $112,000 in Idaho Transportation Department salary costs are involved in administering the program. The bulk of those resources are expended in efforts to avoid fraudulent use of the program. Travel, per diem, printing costs, etc. would bring the total administrative costs to approximately $225,000. Idaho's annual Federal-aid expenditures are approximately $85,000,000.

Other costs are difficult to determine or substantiate. Discussions with two AGC chapters serving Idaho indicate that costs of three to seven percent are added to bids because of the program. It would have to be acknowledged that good faith efforts take time and thus incur costs. It is further recognized that subcontracting work which might otherwise have been done by the prime contractor's own forces involves two overhead costs, and might result in idling equipment. Since we are not privy to the contractor's bid calculation sheets, the extent of these costs cannot be substantiated. As newer DBE/WBE firms become more proficient, their expertise can, and may provide off-setting savings through lower quotations for the work. The percentage compares quite well with those indicated in the AASHTO survey.

7(a). What, if any, experience have you had with firms that do not appear to be legitimate firms?

Idaho's certification committee has denied a number of initial applications for various reasons. Few have appealed. Of these, denial was upheld by the Secretary of Transportation in Washington, D.C. for two, denial was overturned at the State level for one, and a decision is pending at the State level for one. No Idaho certified firm has been successfully challenged by a third party. Appeals generally involve the committee's finding of pro forma compliance. An example would be application of a potential WBE firm from a community property state where the husband has 10 years experience in the field of the firm's business and the wife is a 51% owner of the company, with no experience in that area. Possible "fronts" are carefully scrutinized by the committee.

7(b). How can fraudulent use of this program be prevented?

Abuses of the program are being reduced by careful screening and on-site reviews of applicants, followed by job-site reviews during actual periods of construction.

8. How have States with small minority populations been able to meet the DBE requirements? What, if any, problems have they had in attracting out-of-state DBE firms?

Idaho only has a total of approximately 160 firms in its directory of which 40 are WBE firms. This includes highway construction firms, building construction firms, suppliers, service organizations and consultants. Fifty-one percent of the DBE firms are from out-of-state and seven percent are beyond our surrounding states. These statistics are not surprising for a state with a six percent minority population. Compliance has been particularly enhanced in this state by the presence of one DBE/WBE asphalt supplier/subcontractor. This one firm has accounted for approximately 4% of Idaho's expenditure of STAA '82 funds during each of the last two years.

Mr. Chairman, this last area is one of particular concern to the Idaho Transportation Department. The imposition of a flat 10% goal uniformly over the entire nation, regardless of state or regional minority availability is not equitable. The inequity is not only felt by the non-minority contractors, but must surely be realized by the minority communities in the states with heavier minority populations. The volume of work available does not overtax the contracting ability. Idaho has demonstrated that it is therefore possible to see that 10% of the work goes to a group that comprises 2% of the licensed contractors. This allows areas with a larger percentage of available minorities to perform at a lower rate and still allow the nation to meet an overall goal of 10%.

Another area of concern involves the employment of minorities by DBE/WBE firms. Although this too is a reflection of the low minority population in this part of the country, we would like to see improvement. Of particular interest would be Native American and Hispanics, because of their unemployment rate with respect to that of other ethnic groups in the State of Idaho.

The program must have a conclusion. If it is effective, it should eventually become unnecessary. If it is not effective, it should be abandoned. If it is to be continued for the present, regional goals should be established in proportion to minority firm availability with respect to the overall contracting community.

Mr. Chairman, this concludes my prepared statement. I am pleased to have had the opportunity to appear before this distinguished committee, and I am now prepared to respond to your questions.

UNITED TRIBES EDUCATIONAL TECHNICAL CENTER
3315 SOUTH AIRPORT ROAD
BISMARCK, NORTH DAKOTA 58501 • PHONE 701 255-3285

November 19th, 1985

TESTIMONY OF JAMES K. LADUCER, DIRECTOR, NORTH DAKOTA MINORITY BUSINESS ENTERPRISE PROGRAMS, UNITED TRIBES EDUCATIONAL TECHNICAL CENTER

SUBMITTED TO THE TRANPORTATION SUBCOMMITTEE OF THE ENVIRONMENT AND PUBLIC WORKS COMMITTEE HEARING TO REVIEW SECTION 105(f) OF THE SURFACE TRANSPORTATION ASSISTANCT ACT OF 1982

---

Mr. Chairman and members of the Sub-Committee:

My name is James K. Laducer from the United Tribes Educational Technical Center (UTETC) located in Bismarck, North Dakota. I wish to note my appreciation in being invited to testify before you today about Section 105(f) of the Surface Transportation Assistance Act of 1982. I am the Director of the North Dakota Minority/Women Business Enterprise (M/WBE) program which is a special department of UTETC.

Mr. Chairman, I would request that our detailed testimony be included for the record. I will summarize our testimony at this time.

The United Tribes Educational Technical Center (UTETC) is an accredited postsecondary vocational education school. It was founded in 1969 by the Tribes in North Dakota, and provides training and technical assistance to American Indians and other special populations in our region.

More specifically, the programs which we work with enable opportunities for American Indians, other minorities and women to effectively participate in federally aided highway projects in the state of North Dakota. Since 1976 we have provided recruitment, training and specialized technical assistance to these groups through a "Supportive Services" contract between UTETC and the North Dakota State Highway Department.

Prior to this time no such assistance was available, directly or indirectly, to these special populations. When this program first began there were only eight identifiable M/WBE businesses which were eligible to participate in the minority business highway program. Today there are 129 certified firms as a result of our program. All are eligible to participate under Section 105(f) of the Surface Transportation Act of 1982.

---

Mr. Chairman, the predominant minority population in the State of North Dakota are American Indians. This group represents some three percent of the population.

We have a record of working with Indians, other minorities and women in North Dakota, South Dakota, Montan and Minnesota, as well. We have involved these groups in projects within the state of North Dakota. This work relates to business management, qualification, loans and bonding.

Our program works very closely with such agencies as the North Dakota State Highway Department, the Small Business Administration, the Bureau of Indian Affairs and Minority Business Development Agency.

During the first five years of the supportive services program we were successful in assisting businesses in effectively bidding competitively for highway contracts. Nevertheless, it was not until the implementation of the Surface Transportation Assistance Act of 1982 that we saw significant growth and participation by M/WBE firms in federally aided highway projects. Prior to this time there was no effective mechanism to ensure participation. Because our firms were first generation and largely unrecognized in the business world, they experienced great difficulty in being utilized. There were no specific requirements before 1982 for participation. Section 105(f) of the Act has since put teeth into the program, requiring a minimum of minority and women business participation.

Mr. Chairman, I will now summarize my remarks.

QUESTION: (1) WHAT IS THE CAPACITY FOR DISADVANTAGED BUSINESS ENTERPRISES (DBEs) AND WOMEN BUSINESS ENTERPRISES (WBEs) FOR HIGHWAY CONSTRUCTION WORK?

ANSWER: Presently North Dakota has 92 certified Minority Business Enterprises and 37 certified women business enterprises that are all interested in highway construction work. The majority of these businesses are small speciality companies with a handful of prime contractors.

In reviewing our capacity, our experience shows that North Dakota minority firms have the capabilities to perform at a full 10% level of participation as required under the Surface Transportation Act, Section 105(f).

For example, the total amount of federal funds received for construction in North Dakota from the Federal Highway Administration in FY 1985 was approximately $80,000,000. Ten percent or $80,000,000 of these funds were to be expended by Minority Business Enterprises in performance of construction contracts. As an end result, the Minority Business Enterprises collectively exceeded this goal and reached a figure of $10,077,030. In addition, the Women Business Enterprises received an additional $3,005,922 in contracts. Thus, Minority and Women Business Enterprises in North Dakota participated at a level of $13,082,952 in fiscal year 1985.

As the Director of the Minority Business Enterprise Program for North Dakota, I receive numerous requests each day from both interested minority and women business enterprises. They are seeking assistance in participating in the highway construction industry. It is in my opinion that the resources are virtually untapped in North Dakota and that the capacity could be much greater if the Surface Transportation Act continues.

**QUESTION:** (2) CURRENTLY, HOW MANY DBE'S AND WBE'S ARE BIDDING AS PRIME CONTRACTORS FOR HIGHWAY CONSTRUCTION WORK? HOW CAN MORE DBE AND WBE FIRMS BE DEVELOPED AS PRIME CONTRACTORS?

**ANSWER:** In FY 1985 there were a total of 197 highway construction contracts let by the North Dakota State Highway Department. During this time, there were 10 minorities and 14 women business enterprises that bid as a prime contractor. Their bidding was a direct result of the Surface Transportation Assistance Act, Section 105(f).

In response to the second portion of the question, there are two main areas that need to be implemented by minority and women firms if they are to develop into prime contractors:

1. the firms need to obtain the experience and establish a good track record.
2. the firms need to secure the bonding and capital capabilities to perform the work.

Under the Surface Transportation Assistance Act, the minority and women business enterprises do have the opportunity to get the experience and a good track record. But to get the bonding and capital capabilities is another story. There are all types of lending and bonding institutions that speak in terms of helping minorities. For example, there is Small Business Administration, Bureau of Indian Affairs and Department of Transportation "Guarantee Loan & Bonding Programs" available for minorities. These specific agencies guarantee up to 90% of a loan or a bond. The key is to get a bank and bonding agency to participate.

Because the majority of the minority businesses are American Indians and from reservations, they find it nearly impossible to obtain guarantees, loans and bonds. Their main reasons are:

1. the local banks which have financed like or similar established businesses usually refuse to lend monies to minority businesses from nearby Indian communities. This occurs on or near Indian reservations. Bankers tend to view lending capital to such businesses as potentially harmful to "their own" small businesses and local economic base.

2. usually private banking institutions are controlled by private business persons from that banking community who are in direct competition with our minority firms.

QUESTION: (3) WHAT EFFECT HAS THE SECTION 105(f) PROGRAM HAD ON NON-MINORITY SPECIALITY CONTRACTORS AND WBE's? IF THERE HAVE BEEN ADVERSE EFFECTS HOW SHOULD THEY BE ADDRESSED?

ANSWER: Our experience would not indicate any negative impact on non-minority speciality contractors.

When the general public was requested by the State Highway Department to respond on the recommended goals for FY '86, there were few non-minority speciality contractors who responded.

North Dakota, with a population of about 700,000 people, could use new businesses no matter what the speciality or status is. It is healthy for the economy.

QUESTION: (4) WHAT KIND OF CERTIFICATION PROCESS FOR DBE AND WBE FIRMS SHOULD BE REQUIRED? SHOULD THE PROCESS BE UNIFORM FOR ALL STATES?

ANSWER: Through many years of experience in certifying minority and women business enterprises for the state highway department and other agencies, we have found that the best way for certification was to have an established Screening Committee Board. It has members representing minorities, women and other business persons who are familiar with the highway construction industry, business and accounting procedures and also federal regulations.

When the Screening Committee dates are set, all applicants who claim to be the majority minority or female owners of each firm are required to appear before the Screening Committee Board. They are given an oral interview and answer questions regarding the proposed business and its qualifications. This is in addition to the required documentation.

Usually at the end of the interview, the Screening Committee Board determines whether the business is legitimate and not a front.

We have been very proud of this process and found it to be a very effective method for certification. Other states do their certifying by only reviewing written applications. They then make their determination from the information they receive on paper. This procedure is not thorough and it could be instrumental in allowing fraudulent or "fronting" firms.

I am in total support of a uniform process for certification by all states. In fact, I feel that all states should pattern their certification process after North Dakota.

QUESTION: (5) WHAT KINDS OF TRAINING, FINANCIAL OR OTHER TECHNICAL ASSISTANCE ARE NEEDED BY DBE AND WBE FIRMS? SHOULD THIS KIND OF ASS ANCE QUALIFY TOWARDS THE TEN PERCENT GOAL?

ANSWER: Unlike other states, North Dakota has predominantly first genera n minority and women business enterprises. Before the Section 105(f) program was implemented, there was little or no involvement by any state or federal agency requiring minority business enterprise participation.

Through this program, it gave the minorities an incentive and a future to look forward to developing their own businesses. When the program first started in 1976, we could only identify eight minority firms that were bonafide and interested in bidding highway work. Throughout the years, as stated earlier, we have recruited, assisted and built some 129 minority and women firms in North Dakota.

Most of these firms have received all types of assistance and training through our organization. The training sessions and assistance provided were geared around the areas of bidding & estimating, financial management, production control, scheduling, marketing, loan packaging and bonding, etc.

The problem area, of course, is getting financial backing from lending institutions. Most lending institutions are very reluctant to loan monies to minority businesses. This is because of their of track record and business location. Another major reason that banks are reluctant to lend money is that, as stated earlier, most of our minority businesses in our state are Native Americans and from reservations. The banking institutions where these minority businesses bank are located off the reservations in nearby communities. And when the minority businesses request a loan from the bank, the banks are usually reluctant to assist and thereby denying any requests for lending.

The needed assistance to minority firms in North Dakota is a direct loan and bond program.

To answer the second portion of this question, I do not think that the assistance provided should qualify towards the 10% goal.

QUESTION: (6) WHAT, IF ANY, ADDITIONAL COST DOES THE SECTION 105(f) PROGRAM ADD TO THE FEDERAL-AID HIGHWAY PROGRAM?

ANSWER: Our experience shows that there has been no additional costs as a result of Section 105(f). In fact, I have personally attended every highway letting and can verify that the majority of bids received at the bid lettings have been below the engineer's estimate by a 4% percent average.

In order for states to receive these additional monies they had to justify the need for improvements on roads. All that the federal government was saying is that we will give you the money but you have to use ten percent minimum minority participation. Since all bids under federal law are to be bid competitively, it is of my opinion that section 105(f) program did not require additional monies.

It should be noted that the 1982 Act increased the economic and business opportunities by increasing the allocations to each state. Both majority and minority and women businesses benefitted at no greater cost to the program.

QUESTION: (7) WHAT, IF ANY, EXPERIENCE HAVE YOU HAD WITH FIRMS THAT DO NO APPEAR TO BE LEGITIMATE FIRMS? HOW CAN THE FRAUDULENT USE OF THIS PROGRAM BE PREVENTED?

ANSWER: Through our thorough Screening Committee process we have found that personal interviews with applicants requesting M/WBE status has been very effective in catching fraudulent/front type businesses. Like any other Screening process, there are a few that are hard to catch.

I personally feel that state and federal agencies should be much more strict and stronger with the laws in preventing fraud. Methods for enforcements should include; debarrment, decertification and monitary penalities.

The minority and women business enterprises caught fronting should never have the chance to get certified again.

In reviewing front business operations, we have usually found that it takes two types of persons: a minority and a non-minority. The same penalties which apply for a minority and women business enterprise caught fronting should apply to the prime contractor.

QUESTION: (8) HOW HAVE STATES WITH SMALL MINORITY POPULATIONS BEEN ABLE TO MEET THE DBE REQUIREMENTS? WHAT, IF ANY, PROBLEMS HAVE THEY HAD IN ATTRACTING OUT-OF-STATE DBE FIRMS?

ANSWER: Because the state originally was successful in obtaining a waiver to reduce the annual goal to less than 10%, North Dakota was successful in obtaining waivers every year since. In FY 1983 the goal was reduced to 2.5%, in FY 1984 was reduced to 3.3% and in FY 1985 reduced to 8%. It should be noted that each year where waivers were granted, the minority business always exceeded the goals. In FY 1985 a 10% level of participation was exceeded.

Through a steady growth of minority firms and an increase in participation on highway projects, annual goals were increased to a point where the level of participation of minority businesses today are exceeding the 10% level required by section 105(f) program.

Our view is that the state of North Dakota should no longer have to seek or request any additional waivers of less than a 10% goal.

We feel that if this program is going to have a lasting effect, it must give our minorities in North Dakota the continued opportunities and support to grow to a point where they are self sufficient.

BEST COPY AVAILABLE

# MARYLAND DEPARTMENT OF TRANSPORTATION
# MINORITY BUSINESS ENTERPRISE PROGRAM TESTIMONY
# BEFORE THE
# UNITED STATES SENATE
# SUBCOMMITTEE ON TRANSPORTATION
# OF THE
# COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Chairman Symms, Senator Burdick and the honorable members of the Transportation Subcommittee, my name is Alfred D. Watts and I am the Director, Office of Fair Practices, Maryland Department of Transportation (MDOT). The purpose for my being here is to provide testimony regarding the MDOT's experiences in implementing the provisions of Section 105(f) of the Surface Transportation Assistance Act of 1982.

The MDOT MBE Program for federal-aid contracts is governed by U.S. DOT 49 Code of Federal Regulations (CFR), Part 23, Subparts A, C and D. Subpart D is the section of U.S. DOT regulations which provides for the implementation of Section 105(f) of the Surface Transportation Assistance Act of 1982. Under these federal statutes and regulations, the MDOT is mandated to attempt to achieve a cumulative goal of 10% Disadvantaged Business Enterprise (DBE) participation and 2% Women Business Enterprise (WBE) participation. To assure the attainment of the cumulative goal, MDOT has assigned a 15% DBE participation level and 3% WBE participation level on federal-aid contracts let in Baltimore City - the area which offers the greatest opportunity for DBE and WBE goal attainment.

While the MDOT has had an on-going MBE Program since 1977, the DBE/WBE participation efforts began during fical year 1983

(Beginning July 1, 1982). Accordingly, the MDOT was able to afford a smooth transition to Section 105(f) requirements.

So as to conform with your request for information dated November 8, 1985, each question will be stated and followed by the appropriate answer(s).

1. **What is the capacity for Disadvantaged Business Enterprises (DBEs) and Women Business Enterprises (WBEs) for highway construction work?**

   It is very difficult to determine DBE/WBE capacity because the industry is so dynamic. That is, more minority and female owned businesses are starting up to take advantage of this relatively new opportunity. One possible measure, however, is whether the MDOT is able to meet or exceed its stated DBE/WBE goal. For the Fiscal Years 1983-1985, DBE/WBE participation is as follows:

| Fiscal Year | % of DBE | % of WBE | Overall % |
|---|---|---|---|
| FY '83 | 11.12% | 4.64% | 15.76% |
| FY '84 | 8.26% | 3.71% | 11.97% |
| FY '85 | 10.67% | 2.68% | 13.35% |
| Average | 10.09% | 3.55% | 13.64% |

Actual dollar representations and percentage of work for each DBE/WBE category is provided in the attachments.

2. **CURRENTLY, HOW MANY DBEs AND WBEs ARE BIDDING AS PRIME CONTRACTORS FOR HIGHWAY CONSTRUCTION WORK? HOW CAN MORE DBE AND WBE FIRMS BE DEVELOPED AS PRIME CONTRACTORS?**

   AT PRESENT, THERE ARE VERY FEW DBEs AND WBEs BIDDING AS PRIME CONTRACTORS ON HIGHWAY CONSTRUCTION WORK. HOWEVER, THIS IS NOT SURPRISING BECAUSE OF THE NATURE OF THE CONSTRUCTION. IT TAKES MANY YEARS BEFORE A SUBCONTRACTOR IS ABLE TO DEVELOP THE CASH FLOW AND CREDIT TO PURCHASE THE EQUIPMENT NEEDED TO BE A PRIME CONTRACTOR. SECTION 105(F) HAS ONLY BEEN IN EXISTENCE FOR ABOUT THREE (3) YEARS. THUS, MUCH MORE TIME IS NECESSARY TO DETERMINE THE GROWTH OF FIRMS FROM SUBCONTRACTORS TO PRIME CONTRACTORS.

3. **WHAT EFFECT HAS THE SECTION 105(F) PROGRAM HAD ON NON-MINORITY SPECIALTY CONTRACTORS AND WBEs? IF THERE HAVE BEEN ADVERSE EFFECTS, HOW SHOULD THEY BE ADDRESSED?**

   THE SECTION 105(F) PROGRAM HAS HAD NO DOCUMENTABLE EFFECT ON NON-MINORITY SPECIALITY CONTRACTORS. THAT IS, THERE IS NO OBJECTIVE EVIDENCE THAT SECTION 105(F) HAS CAUSED SPECIALTY CONTRACTORS A PROBLEM THAT WOULD NOT HAVE BEEN CAUSED BY OTHER FACTORS - NEW COMPETITION, DOWN-TURN IN THE ECONOMY, RISE IN THE COST OF LABOR AND MATERIAL, ETC.

4. **What kind of certification process for DBE and WBE firms should be required? Should the process be uniform for all States?**

The certification process should be one which requires actual investigation by trained staff as opposed to self-certification or "document review only" certification. Many of the problems currently experienced can be avoided if field investigations and the disclosure of all relevant documents are an integral part of the certification process. If a process of this type were implemented by all States, uniformity could be possible. However, if self-certification or "document review only" certification is employed, uniformity would only lead to a worsening of the problem.

5. **What, if any, additional training, financial or other technical assistances are needed by DBE and WBE firms? Should this kind of assistance qualify towards the ten percent goal?**

The only true assistance is in the area of bonding and capitalization. DBEs and WBEs are, as a rule, restricted by their inability to obtain adequate bonding and short-term capital and/or long-term capital. In the absence of the above, a transition from subcontractor to prime contractor will take a considerably longer time to accomplish. With regards to qualifying technical assistance toward a goal, that might be difficult because technical assistance, per se, cannot be quantified. For example, if a DBE or WBE obtains technical assistance in filling out a form, what is the value of the technical assistance? Who would make that judgment? How could the technical assistance be monitored to insure the value is not an inflated value?

6. **What, if any, additional costs does the Section 105(f) program add to the Federal-aid Highway Program?**

Subcontractors give "quotes" which are open to negotiations. Prime contractors provide "bids" which are firm and fixed by nature. Accordingly, an alleged high "quote" is only as high as the final negotiations permit. Shopping of subcontractors is a common practice among many prime contractors. Suppliers may offer to sell Contractor "X" an item substantially higher than he offers to sell to Contractor "Y." These practices were in place before Section 105(f). Accordingly, one cannot say that Section 105(f) added to the cost of a project without taking into consideration the practices noted above.

7. WHAT, IF ANY, EXPERIENCE HAVE YOU HAD WITH FIRMS THAT DO NOT APPEAR LEGITIMATE? HOW CAN THE FRAUDULENT USE OF THIS PROGRAM BE PREVENTED?

   MARYLAND HAS HAD ITS SHARE OF FIRMS THAT DO NOT APPEAR TO BE LEGITIMATE. TO COMBAT THIS PROBLEM, THE MARYLAND GENERAL ASSEMBLY PASSED A MBE FRAUD STATUTE WITH STIFF SANCTIONS TO DETER ABUSE. MEASURES, SUCH AS THE ONE DESCRIBED, MUST BE TAKEN AND USED, WHEN NECESSARY, TO CURB ABUSE.

8. HOW HAVE STATES WITH SMALL MINORITY POPULATIONS BEEN ABLE TO MEET DBE REQUIREMENTS? WHAT, IF ANY, PROBLEMS HAVE THEY HAD IN ATTRACTING OUT-OF-STATE DBE FIRMS?

   SINCE THIS QUESTION DOES NOT APPLY TO MARYLAND, AN ANSWER IS NOT PROVIDED.

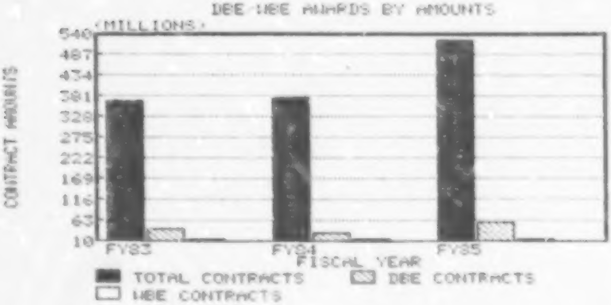
I WANT TO THANK THE COMMITTEE FOR GIVING ME THE OPPORTUNITY TO APPEAR BEFORE YOU AND I STAND READY TO ANSWER ANY QUESTIONS.

ATTACHMENT A

## Maryland Department Of Transportation
## Total DBE and WBE Awards
## BY TOTAL CONTRACTS AMOUNT
## FY83 to FY85

| FISCAL YEAR | TOTAL CONTRACTS | DBE CONTRACTS | % OF DBE CONTRACTS |
|---|---|---|---|
| FY83 | $367,542,330.00 | $40,886,854.00 | 11.12% |
| FY84 | $377,222,036.00 | $31,219,838.00 | 8.28% |
| FY85 | $523,950,714.00 | $55,892,316.00 | 10.67% |
| TOTAL | $1,268,715,080.00 | $127,999,008.00 | 10.09% |

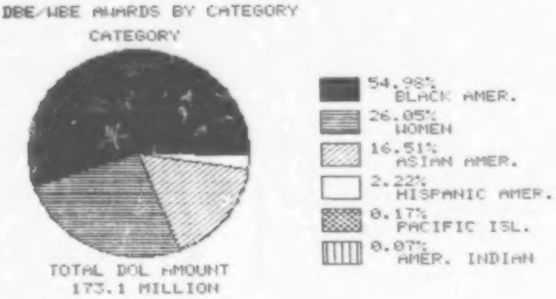
| WBE CONTRACTS | % OF WBE CONTRACTS |
|---|---|
| $17,054,627.00 | 4.64% |
| $13,983,090.00 | 3.71% |
| $14,054,900.00 | 2.68% |
| $45,092,617.00 | 3.55% |



ATTACHMENT B

Maryland Department Of Transportation
Total DBE and WBE Awards
BY CATEGORY
FY83 to FY85

| CATEGORY | SUBCONTRACT AWARDS ($) | SUBCONTRACT AWARDS (%) |
|---|---|---|
| AMERICAN INDIAN | $115992.00 | 0.07% |
| ASIAN AMERICAN | $28589000.00 | 16.51% |
| BLACK AMERICAN | $95153584.00 | 54.98% |
| HISPANIC AMERICAN | $3846461.00 | 2.22% |
| PACIFIC ISLANDER | $293971.00 | 0.17% |
| WOMEN | $45092617.00 | 26.05% |
| TOTALS | $173091625.00 | |



MARK O. HATFIELD, OREGON, CHAIRMAN

TED STEVENS, ALASKA
LOWELL P. WEICKER, JR., CONNECTICUT
JAMES A. McCLURE, IDAHO
PAUL LAXALT, NEVADA
JAKE GARN, UTAH
THAD COCHRAN, MISSISSIPPI
MARK ANDREWS, NORTH DAKOTA
JAMES ABDNOR, SOUTH DAKOTA
ROBERT W. KASTEN, JR., WISCONSIN
ALFONSE M. D'AMATO, NEW YORK
MACK MATTINGLY, GEORGIA
WARREN RUDMAN, NEW HAMPSHIRE
ARLEN SPECTER, PENNSYLVANIA
PETE V. DOMENICI, NEW MEXICO

JOHN C. STENNIS, MISSISSIPPI
ROBERT C. BYRD, WEST VIRGINIA
WILLIAM PROXMIRE, WISCONSIN
DANIEL K. INOUYE, HAWAII
ERNEST F. HOLLINGS, SOUTH CAROLINA
LAWTON CHILES, FLORIDA
J. BENNETT JOHNSTON, LOUISIANA
QUENTIN N. BURDICK, NORTH DAKOTA
PATRICK J. LEAHY, VERMONT
JIM SASSER, TENNESSEE
DENNIS DeCONCINI, ARIZONA
DALE BUMPERS, ARKANSAS
FRANK R. LAUTENBERG, NEW JERSEY
TOM HARKIN, IOWA

J. KEITH KENNEDY, STAFF DIRECTOR
FRANCIS J. SULLIVAN, MINORITY STAFF DIRECTOR

**United States Senate**
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510

November 21, 1985

The Honorable Robert T. Stafford
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Senator Stafford:

I want to congratulate you and the Committee on Environment and Public Works for the foresight in holding hearings on the effect of Section 105(f) of the Surface Transportation Act of 1982.

This provision, commonly referred to as the setaside for disadvantaged business enterprises (or DBEs) has had implications which, in my mind, were not envisioned when Section 105(f) was created. These effects have brought about significant dislocations for specialty contractors in North Dakota. To give you a better understanding of how Section 105(f) has affected our businesses in North Dakota, I ask that you include, as part of the hearing record, the enclosed two statements from the Dakota Fence Company of Fargo and the Associated General Contractors of North Dakota.

In a nutshell, Section 105(f) has disrupted fair and efficient business practices in our State while it has failed to promote the kind of legitimate opportunity for minority business enterprises it envisioned. Therefore, I hope that the Committee will look carefully at this provision as it prepares for reauthorization of the Surface Transportation Act.

Sincerely,

Mark Andrews

MARK ANDREWS
U. S. Senator

MA/bsp
Enclosures

**Dakota Fence Company**

OFFICE (701) 258-9095
ROD RICK

1130 BASIN AVENUE
BOX 62
BISMARCK, NORTH DAKOTA 58502

BRANCH OFFICES
FARGO, N. DAK.
MINOT, N. DAK.

November 19, 1985

Testimony of Dakota Fence Company
Presented to the Senate Committee on
Environment and Public Works November 19, 1985

Mr. Chairman:

Thank you for the opportunity to present the opinions and experiences of our company regarding Section 105(f) of the 1982 Surface Transportation Assistance Act.

Dakota Fence Company was founded in 1972 by my brother, David L. Currier and my father, Richard L. Currier. It started with one pickup truck and $ 500.00. Over the course of 10 years, and due to the hard work of a number of people, the company grew to the point where we employed close to 100 people.

Due to the MBE Goal/quota, our company's future is in jeopardy. This year for the first time ever, as a direct result of section 105(f), we layed off employees in the months of September and October.

It is not our place to address the reasons for and the intent of Section 105(f), but instead, to point out how this provision is promoting waste, fraud, and selectivity, destroying non-DBE highway specialty contractors such as ourselves.

Because the highway industry has a relatively small percentage that is historically sub-contracted (approximately 10%) in order to conform to the 10% DBE goal/quota a prime contractor is forced to sub-contract virtually all subcontract items to minorities at higher prices. On one occasion, our firm was forced to raise our bid on a $400,000 project by $37,070.00. The reason for this is that we had to ignore a lower subcontract bid in order to achieve 10% DBE participation which was mandatory on this project.

At virtually every highway letting we attend, there are instances of prime contractors using higher priced minority subcontractors in order to fill the particular goal/quota on the various projects. In all instances, the prime is forced to artificially raise his price, thereby costing the taxpayers additional highway dollars and jobs. And make no mistake, this is not small amounts of money. If the cross section of the country is similar to our experience, it is hard for me to imagine the millions of dollars wasted.

The basic underlying truth is that the "low bid concept" for spending taxpayers dollars on public works has been destroyed by Section 105(f). The contracting industry is the wrong environment to promote this style of affirmative action.

Another critical failure of Section 105(f) is the rampant fraud and collusion it promotes. On one project we were accepting sub quotes on, a non-minority subcontractor called me to get information on the project. Upon our asking for his quote, he informed us he would quote a minority who would then quote us after he had marked the price up. This "front" set up raised the price of the non-minority from approximately $ 36,000.00 to $ 70,000.00. In other words, the non-minority working through a minority front was going to cost the taxpayer an additional $ 34,000.00.

Our company rarely bids as a prime contractor. Based on our brief experience as a prime bidder, it is mind boggling to imagine the waste and fraud being generated by this program with every passing letting. I have also witnessed many instances of minority subcontractors contracting to do an item of work and when I visit the jobsite, I see the work being done by non-minority contractors.

Because of the grey area in defining legally this type of action, I summarize it through the simple terms "front", "sham", and "fraud", at every level, in every state, at every letting, during every month. In my opinion, based on the events I have witnessed, this provision has promoted more corruption than any other government action since prohibition.

The most appalling "accomplishment" of this provision is how it is selectively destroying and discriminating against non-minority specialty contractors, such as ourselves. Historically, the only items subcontracted on a highway project are items such as guardrail, fence, signs, seeding, and landscaping. Consequently, many prime contractors will not even accept our bid once they learn we are not a minority subcontractor.

It is very frustrating for principals of our firm to continue to bid projects, continue to be low, and continue to have our bid passed over by the prime contractor in favor of a higher sub quote from a minority. In other words, our overhead grows steadily because it is more difficult to win jobs and our base of small specialty guardrail and fence projects continues to shrink. We have held on since 1982, but connot continue if this provision is included in the next highway bill.

Senate Committee on Environment and Public Works
November 19, 1985
Page 3

In summation, as a result of the waste, fraud, and reverse discrimination we have witnessed and been victims of since 1982, I feel totally justified in urging the complete elimination of anything remotely resembling Section 105(f) in the next highway bill.

America is billed as "the land of opportunity". I hope and trust you will not abandon the goals and visions of our country's founding fathers.

Sincerely,

DAKOTA FENCE COMPANY

Daniel R Currier

Daniel R. Currier
Corporate Secretary

DC/mw

CURT PETERSON
Executive Vice President

Associated General Contractors of North Dakota

422 2nd STREET, P.O. BOX 1624, BISMARCK, NORTH DAKOTA 58502, PHONE 701-223-2770

November 11, 1985

Senator Mark Andrews
Box 3004
Fargo, North Dakota 58108

Dear Mark:

As per a discussion with Mr. Bruce Post of your Fargo Office, I am enclosing some information relative to the impact in our State of the Minority Contracting Provisions contained in the 1982 Surface Transportation Act.

Enclosed you will find two AGC of America publications which speak to this issue on a national basis and also contain information concerning specific problems encountered in North Dakota. These may be found on page #7 of the "Stop Legislated Discrimination" Publication and on page #11 of the "Discriminatory Impact" Publication. Also enclosed is a resolution passed by our Highway Division on September 6, 1985 expressing their concern and frustration with this matter.

In addition to the enclosed material, it is safe to say that this particular issue has caused more frustration and confusion within our highway industry than anything else that has come along in recent memory. This Provision was ill-conceived, is counter-productive and in our minds, simply does not work, and will never accomplish what it was intended to do.

To make matters even worse, it has been detrimental to those existing non-minority sub-contractors who have struggled for years to build a viable business. It has also been a detriment to those minority contractors who were in the business before the program began in that it has created a whole host of "opportunists" and program "users and abusers" with whom they must now compete.

I can not emphasize strong enough that it is our firm conviction that "social engineering" of this sort will never produce any worthwhile benefits.

AMERICA PROGRESSES THROUGH CONSTRUCTION *Construct by Contract*

The concept of preferential consideration for highway construction has been tried and serious effort has been made. I think we are long overdue in facing the fact that it is not a viable program but rather a social welfare program that has done nothing for anyone with the exception of costing the taxpayers a great deal of money and if allowed to continue, will destroy in total the competitive bidding process in this industry.

Mark, your assistance in our behalf in eliminating these wasteful provisions from the Highway Transportation Act are sincerely appreciated.

Sincerely,

Curt

CURTIS L. PETERSON
Executive Vice President

CLP:rs

Enclosures

## RESOLUTION

WHEREAS The Minority population in North Dakota accounts for approximately 3% of the State's population, and

WHEREAS Several Minority owned firms are now and have been involved in the Construction Industry, and

WHEREAS The Surface Transportation Assistance Act of 1982 calls for a minimum of 10% of all Federal-Aid highway work to be subcontracted to Minority owned businesses, and

WHEREAS This requirement has been detrimental to existing minority and non-minority subcontractor firms alike, and

WHEREAS These requirements have not accomplished the results that were intended, as newly formed MBE companies have not made any significant advancement in ability or capability, and

WHEREAS The entire concept of Minority preference is a costly hinderance to the Construction Industry and all but destroys the competitive bid process,

NOW THEREFORE BE IT RESOLVED that the new Surface Transportation Act to be established during the next Session of Congress, not include Minority or Disadvantaged Business preference requirements.

AGC of North Dakota
Highway Division Members

CARDISS COLLINS, ILLINOIS, CHAIRWOMAN
MAJOR OWENS, NEW YORK
TOM LANTOS, CALIFORNIA
GERALD D. KLECZKA, WISCONSIN
MATTHEW G. MARTINEZ, CALIFORNIA

NINETY-NINTH CONGRESS

Congress of the United States
House of Representatives
GOVERNMENT ACTIVITIES AND TRANSPORTATION
SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-350-A-B
WASHINGTON, DC 20515

ALFRED A. (AL) McCANDLESS, CALIFORNIA
PATRICK L. SWINDALL, GEORGIA
THOMAS D. (TOM) DELAY, TEXAS

(202) 225-7920

November 19, 1985

The Honorable Steven D. Symms
Chairman

The Honorable Quentin N. Burdick
Ranking Minority Member
Subcommittee on Transportation
Committee on Environment and
  Public Works
United States Senate
Washington, D.C.  20510

Dear Mr. Chairman and Senator Burdick:

I understand that your subcommittee is in the process of reviewing the Section 105(f) Disadvantaged Business Enterprise [DBE] Program of the Surface Transportation Assistance Act of 1982. That program, as you know, seeks to provide full and fair minority and disadvantaged business participation in the Department of Transportation [DOT] $70.1 billion highway and transit spending programs. I wish to submit this letter for the printed record of your investigation and hearing.

As Chairwoman of the House Subcommittee on Government Activities and Transportation, I launched a similar investigation into federal, state and local implementation of that program immediately following its enactment in January 1983. That oversight was conducted throughout the six-month period during which DOT-implementing regulations were being prepared for promulgation. We received testimony at three hearings from federal, state and local officials, minority and non-minority entrepreneurs, plus business professionals and academics who specialize in the problems of disadvantaged and other small businesses.

The work of the subcommittee culminated in a unanimously adopted Report of the Committee on Government Operations, House Report 98-585, entitled Improving the Department of Transportation Programs for Minority, Women, and Disadvantaged Businesses, which I have attached for your consideration.* I urge your subcommittee to fully consider DOT implementation of the DBE program, as we did, because many of the problems which affect this program are attributable to weak Departmental management and enforcement.

---

*Retained in committee files.

Chief among our Committee's findings was that in implementing the new DBE program, DOT significantly reduced the enforcement mechanisms that existed in the previous program while expanding the scope of that previous program. In the words of the Committee "this represents two steps forward and two steps back." The DBE enforcement mechanism was described as "eviscerated" by the Committee, which also found that the Department had "deliberately tied its enforcement hands in response to the Congressional command that it strengthen the program."

The Government Operations Committee found numerous programmatic problems in DOT's then-current implementation of its predecessor Minority Business Enterprise (MBE) Program and the parallel Women's Business Enterprise (WBE) Program. The Committee specifically recommended that DOT should review and revise its passive approach toward combatting "front and middleman abuse".

In addition, DOT's management information system was so deficient in data collection and interpretation that the Committee concluded "the MBE and WBE programs were being operated in almost total darkness." The Committee also urged DOT to make simple revisions in its certification forms which would promote DBE participation and simultaneously reduce program abuse.

Finally, the Committee concluded that the Women's Business Enterprise Program was an "orphan program" in the Department receiving not even minimal monitoring in the operating administrations. Growth, if any, was occurring not because of DOT, but in spite of the Department.

The DBE program has been vigorously opposed in all possible forums by non-minority contractors, who often characterize the program as impermissible reverse discrimination. This argument was fully refuted in a 1980 Supreme Court Case involving the validity of the Public Works Employment Act of 1977, then being implemented by the Department of Commerce. In Fullilove vs Klutznick, Chief Justice Burger, writing for the majority, stated:

> "The legislative objectives of the MBE program must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity". (448 U.S. 463)

The Chief Justice, addressing the implications for nonminority firms, wrote:

> Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective; similarly, past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of "business as usual" by public contracting agencies and among prime contractors.

The Chief Justice continued:

> It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities. Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

The Court's decision in *Fullilove* relied heavily upon numerous characteristics of the Commerce Department's 1977 MBE program, all of which, the Court concluded, effectuated a limited and properly tailored remedy to cure the effects of prior discrimination:

(1) Careful identification of the minority groups encompassed by the program;

BEST COPY AVAILABLE

(2) Creation of a process to eliminate from participation in the program, firms which are not bona fide MBE firms including:

    (a) a certification procedure.
    (b) a complaint procedure.

(3) A procedure to prevent exploitation of the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination;

(4) The opportunity to demonstrate that grantee/contractor best efforts will not succeed or have not succeeded in achieving the statutory 10 percent floor for participation of eligible firms;

(5) The use of racial and ethnic criteria is premised upon assumptions rebuttable in the administrative process.

The Section 105(f) program incorporated all of these saving provisions.

I am sympathetic to your subcommittee's evident desire to fully explore the economic impact of the DBE program requirements on firms not eligible to participate, but I respectfully caution that dramatic representations of adverse consequences for certain ineligible firms should not be misapplied. The Chief Justice's opinion recognized that such federal actions as the 1977 MBE program (and the 1983 DBE program) would result in some economic dislocation. Some companies, which have traditionally been nourished by federal transportation spending, inevitably lose federal business as DBE participation requirements become effective.

Many of these firms describe their decline in federal business by having reference to the very periods of time during which their actual and potential minority and disadvantaged competitors were facing de facto exclusion from the marketplace. Others are facing hardships because they are facing competition which is partially distorted by DBE preference statutes intended to promote long-term competition through partial short-term adjustments being made by Congress. Congress and the President have determined that strategy to be necessary and proper and the Supreme Court has upheld the constitutionality of such a legislative strategy.

I respectfully urge you and the members of your subcommittee to give full consideration to these points and the attached Report of the House Committee on Government Operations as you explore the issues raised in your oversight of the Section 105(f) Disadvantaged Business Enterprise Program.

Sincerely,

CARDISS COLLINS
Chairwoman

CC:MZ:eg
Attachment

BILL SHEFFIELD
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

November 20, 1985

The Honorable Steve Symms
Chairman
Transportation Subcommittee
Senate Environment
  and Public Works Committee
405 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Mr. Chairman:

This letter is being submitted as testimony for the hearing on Section 105(f) of the 1982 Surface Transportation Act which provides for the disadvantaged business enterprise program.

The State of Alaska believes that accomplishing the intent of Section 105(f) of the Surface Transportation Act is very important. As a result, we have used the regulations published by the Federal Highway Administration (FHWA) not only for federaly shared projects, but also as a model for our state-funded contracts. The program has resulted in a significant increase in the participation of Disadvantaged Business Enterprises (DBE) and Women Business Enterprises (WBE) in the highway construction industry.

While Alaska has been able to meet or exceed the 10 percent goal for disadvantaged business enterprises, it has done so only by the heavy utilization of relatively large minority owned firms. The 10 percent goal has not resulted in the hoped-for growth of existing small DBE/WBEs or the creation of new firms.

Based on our experience implementing Section 105(f), we feel that there are six (6) factors which limit the creation and growth of small DBE/WBEs. We see the failure to achieve this stimulation of small businesses as our first major criticism of the current law. The six factors that we have identified as barriers to small firm participation are:

1. The current small business size limit of $17,500,000 includes all but the largest Alaskan firms. The majority of non-minority construction firms operating in Alaska do not exceed the current SBA size standards. We recommend that the standards be reduced substantially or

that separate size standards be adopted in order to focus the program on firms which have serious barriers to overcome and would be unlikely to participate without the Section 105(f) program. We recommend that the standards for general contractors be reduced to $7,500,000 and specialty contractors to $2,500,000.

2. Because there are no time limits to a firm's participation as a DBE/WBE, once it is certified for participation, firms which are well established can remain in the program indefinitely. This creates a situation where it is very difficult for a new firm to successfully compete. Perhaps the program can be structured to offer an incentive for the less well established small firm.

3. Since relatively larger and well established firms can be used to meet the 10 percent participation goal by the prime contractor, there is no incentive for prime contractors to expend the extra effort needed to work with new firms. The program requirements could be modified to create such an incentive.

4. Small DBE/WBEs are at a competitive disadvantage compared to the larger DBE/WBE firms for the following reasons:

    a. They frequently cannot get bonding and must ask the prime for assistance.

    b. They frequently have cash flow problems.

    c. They frequently lack experience in dealing with the paperwork and procedures of public sector contracting.

    d. They frequently lack bidding, estimating, and project management skills.

    e. They frequently lack adequate equipment.

5. New and small DBE/WBEs which win contracts are often pressured to overextend, and this frequently results in monetary loss, as well as the creation of a poor record of performance as a contractor.

6. In order for small DBEs and WBEs to increase their ability to compete and to participate successfully as stable businesses, technical assistance is frequently needed.

BEST COPY AVAILABLE

Additional funding should be included in order for states to provide better technical, business, and financial assistance to them. This type of assistance needed by DBE/WBEs can most effectively be provided at the state rather than the regional level.

The second major area of concern Alaska has with the current Section 105(f) program involves the use of "front" businesses to satisfy the minority business participation requirement. Because there is inadequate technical and financial assistance available for new and very small DBE/WBEs, it is easier for prime contractors, non-minority subcontractors, and minority individuals to create a front rather than to work with legitimate DBE/WBEs. To resolve this problem the following steps need to be taken:

1. Certification criteria need to be uniformally enforced nationwide. Currently some states have relatively weak certification programs.

2. The definition of "commercially useful function" needs to be further clarified and expanded.

3. The cost for certification and monitoring is substantial. States need additional financial resources.

4. The U.S. Department of Transportation needs to increase its capability to process appeals of certification denials and fraud complaints in a timely manner.

In spite of the problems that we have outlined in our testimony, we are in strong support of maintaining the Section 105(f) requirements in the reauthorization of the Surface Transportation Act. If the Section 105(f) program is discontinued, it should be replaced with a program which can better address the goal of increasing minority participation with a special emphasis on encouraging growth of small firms.

Thank you for the opportunity to comment on the importance of Section 105(f) to Alaska.

Sincerely,

Bill Sheffield

Bill Sheffield
Governor

# STATEMENT OF WALTER R. HJELLE, COMMISSIONER
# NORTH DAKOTA STATE HIGHWAY DEPARTMENT

BEFORE THE

TRANSPORTATION SUBCOMMITTEE OF THE
ENVIRONMENT AND PUBLIC WORKS COMMITTEE

HEARING TO REVIEW
SECTION 105(F) OF THE SURFACE TRANSPORTATION
ASSISTANCE ACT OF 1982

NOVEMBER 19, 1985

Mr. Chairman and Members of the Subcommittee:

## I. OPENING STATEMENT

Over the last four years, the department has realized a significant increase in the participation of disadvantaged and women's business enterprises (DBE/WBE) on highway construction projects.

A great part of the department's success in this program is due to the progressive philosophy of "slow, steady growth." From the beginning of implementation of the Surface Transportation Assistance Act of 1982 (STAA), the department asked for and received goal waivers to levels which we viewed as realistic and attainable. Each year the goals were reached and surpassed by a small margin. The following is a brief overview of those achievements:

| FISCAL YEAR | NUMBER OF DBE FIRMS | NUMBER OF CONTRACTS | PARTICIPATION |
|---|---|---|---|
| 1982 | 32 | 25 | $895,974.00 |
| 1983 | 55 | 32 | $1,949,612.00 |
| 1984 | 84 | 60 | $4,599,736.00 |
| 1985 | 92 | 90 | $8,414,520.00 |

| FISCAL YEAR | NUMBER OF WBE FIRMS | NUMBER OF CONTRACTS | PARTICIPATION |
|---|---|---|---|
| 1982 | 8 | 8 | $437,753.00 |
| 1983 | 15 | 16 | $1,704,811.00 |
| 1984 | 31 | 50 | $6,563,314.00 |
| 1985 | 37 | 81 | $5,736,596.00 |

The department's overall goals were achieved because an aggressive plan was initiated and each year that plan was improved.

The current plan consists of five target areas:

1. Reorganization of responsibilities and delineation of authority.
2. Development and implementation of sanctions for noncompliance.
3. Hands-on technical assistance to firms.
4. Provision of educational programs in targeted areas of need.
5. Increased communication at all levels.

The department's Civil Rights Officer is responsible for developing and monitoring the DBE/WBE program. The Construction Division is responsible for monitoring actual participation of firms on construction projects through its project personnel.

## II. DBE/WBE CAPACITY

### Current Capacity

In reviewing the slowed rate of growth in the number of DBE/WBE firms (as previously noted in our achievements), we believe the number and capabilities of firms have reached or are near their saturation point.

We have only four DBEs and three WBEs currently bidding as prime contractors. The balance of 88 DBEs and 34 WBEs bid strictly as subcontractors. Approximately 23 percent of our highway construction dollars go toward subcontracted work. This percentage, however, is probably inflated because we have no way of knowing how much work would have been subcontracted if prime contractors didn't have to meet assigned DBE/WBE goals. In good economic times, prime contractors tend to subcontract lots of work, but now they do many of the work items themselves.

Development of a prime contractor is a long process. Many firms start as subcontractors and never leave the ranks. Many do not want to. Of those DBE/WBE firms who are bidding as primes today--all were in business working as primes prior to the inception of this program. Logistically prime contractors and subcontractors all have a saturation point. The economy will only allow so many of each to survive.

Ninety-five percent of the firms beginning today started on a "shoe string." They are grossly underfinanced, and they have little or no working capital. Without those two items, their chances of survival as a subcontractor are slim, and their chances of becoming a prime are none!

### Effect on Other Contractors

DBE/WBE firms now handle 15 percent of the highway work subcontracted in North Dakota. As mentioned before, 23 percent of all contracts are subcontracts. Therefore, only eight percent of our total subcontracts are now handled by non-DBE/WBE firms which previously handled all subcontracts before introduction of this program.

If you combine that statistic with the recent decline in the building and construction industries, it's obvious that many non-DBE/WBE firms have been squeezed out and are probably out of business.

## III. CERTIFICATION AND TECHNICAL ASSISTANCE

### Certification

We employ a stringent certification process in North Dakota and have found that it has helped us avoid problems other states have encountered. By being thorough up front, we have found our newly formed DBE/WBE firms have been performing quite well.

The department's certification/decertification process is handled by a three-member eligibility committee comprised of the Civil Rights Officer, the Construction Division Senior Manager, and the Finance Director. All in-state firms are required to complete an eligibility application packet and appear before the committee for an oral interview. On-site reviews may be conducted where necessary prior to the oral interview. Recommendations regarding a firm's eligibility are forwarded to the State Highway Commissioner who makes the final determination.

Out-of-state firms certified in their home state are automatically certified by the department upon completing an eligibility packet and providing a copy of certification by their home state. Out-of-state firms not certified by their home state are handled in the same manner as in-state firms.

Either the Civil Rights Officer or the Construction Division staff may initiate a request to review a firm for possible decertification. An on-site review is conducted and the case for decertification is presented to the committee. Recommendations regarding the firm's eligibility are forwarded to the Highway Commissioner for his action. The firm is notified in writing of the department's intent to decertify and the reasons for the action. The firm is given the opportunity to request an informal hearing. If no hearing is requested, the firm is automatically decertified. If a hearing is requested, the committee hears all testimony and then makes recommendations to the Commissioner.

Problems are encountered in the certification process because of the quality and validity of other state's certification processes. Many states perform only cursory review, and because of budget constraints we are forced to accept these certifications without verification.

For example, a minority-owned firm which was certified by its home state was seeking certification in North Dakota. The data provided with the initial request for certification stated the firm had incorporated with a $1,000 capital investment. While processing the request, we found the investors had put $24,000 more into the firm, and within several weeks had acquired almost $2 million of work in three states working with only one contractor. When questioned as to how the minority owner had calculated his labor cost, he indicated he was still in the learning stage regarding calculating the cost of his labor, and yet he already had $2 million worth of work. Further investigation revealed the minority partner had worked as a construction laborer for four years, sold real estate, and had a degree in accounting. The non-minority partner had considerable construction experience and owned a construction equipment rental business. The firm was actively bidding, had no equipment or employees, and was already prepared to work in three states. The questions we asked were, "Can this company really be considered a company without any equipment? Was the capital investment proportionate to the amount of work for which they contracted? On what basis had the home state granted the original certification?"

Many of the rules for determining eligibility of a firm are not clear cut at this time. Pending further clarification from the Federal Highway Administration, the department's philosophy is that:

1. The capitalization of a firm should be proportionate to the amount of work the firm takes on, and

2. The firm must actually be doing business prior to application for certification. For example, it must have equipment and be actively bidding on projects.

The department has maintained a strong certification process. We feel that by doing a thorough screening up front, we eliminate problems before they occur. A strong certification process is a benefit to both the contracting industry and to legitimate DBE/WBE firms because it assures prime contractors that they are dealing with bonafide firms. Less time is needed to conduct costly decertification reviews and time can be more wisely spent on actual program implementation.

As a result of our experience, we strongly believe all other states should be directed to have a stringent certification program. Perhaps strong minimum federal guidelines could be set, with all states uniformly following them. States which want an even more stringent program could add their own guidelines.

In addition to our special emphasis on DBE/WBE certification and decertification this year, we've focused on the good faith efforts of prime contractors who are unable to reach the assigned DBE/WBE goal.

After bid opening and prior to award, contractors who are unable to reach the assigned DBE and WBE goals must prove their good faith efforts by completing four steps provided in our special provisions. Data provided by the contractor is reviewed by a three-member board consisting of the Construction Engineer, the Program and Project Development Engineer, and the Civil Rights Officer. Based on their findings, the committee makes recommendations to the Commissioner whether or not to award.

## Technical Assistance

North Dakota's minority population is principally Native American. The department has maintained a supportive services contract with the United Tribes Educational Technical Center for 15 years. Their primary responsibility under this contract is to provide hands-on technical assistance to minority and women-owned firms in the form of contract procurement, bidding, bonding, loan packaging, bookkeeping, compliance with federal and state rules and regulations, and basic business management. Secondary responsibilities included on-site certification reviews, some project monitoring, publishing a monthly newsletter, and assisting with annual workshops. The Special Programs office has been instrumental over the years in acting as a liaison between DBE/WBE firms and the contracting industry.

We feel very strongly that the funding for local supportive service contracts should be continued and increased where states are reaching their goals. The states within our region are principally rural. Consequently, the channeling of procurement management center dollars directly to the states would result in a better utilization of federal funds. The services which procurement management centers are able to provide to these rural states is marginal. We would encourage serious consideration be given to this suggestion.

## IV. CONTRACT MONITORING

### Monitoring

Monitoring actual participation is a constant and difficult process. Historically, department project personnel have been taught that the prime contractor is responsible for the project and that department staff members should not get involved in the prime-subcontractor relationship. Over the last several years, however, the department has had to change that philosophy. Project personnel are now required to monitor the subcontract relationship more closely to determine whether both groups are complying with their areas of responsibility under the DBE/WBE program. A department goal for the upcoming months is to conduct intensive training programs with our project personnel to enable them to do a better job of monitoring DBE/WBE participation on their projects.

Sanctions

In order to maintain compliance with the program by both DBE/WBEs and prime contractors, the following sanctions were developed and implemented:

1. Withholding progress payments for work to have been performed by the DBE/WBE; or
2. Finding the contractor in default; or
3. Disallowing the contractor to bid on any project to be let for two or more regularly scheduled bid openings following the date of imposition of the sanction; or
4. Suspending the subcontractor's status as a DBE/WBE for two or more regularly scheduled bid openings following the date of imposition of the sanction; or
5. Decertifying the subcontractor as a DBE/WBE; or
6. Any combination of the above.

We believe the implementation of these sanctions has caused both the minority and non-minority contracting industry to take their commitments more seriously.

## V. PROBLEM AREAS

### Overextension and Project Scheduling

In the 1984 construction season, we found our most serious problems were overextension and project scheduling. DBE/WBE firms often bid on single jobs which were beyond their capability, or they "blanket bid" an entire letting hoping to get one job but sometimes get more than they can handle.

Overextension occurs because states are not allowed to prequalify or limit subcontractors as they do with prime contractors. In most cases, state laws require certified financial statements or bonds to establish a prime contractor's capability or prequalification level. This requirement, however, is considered a barrier to DBE/WBE firms because most of them cannot get a bond nor can they afford to have certified financial statements prepared. Consequently, under either of these circumstances, the prime contractors often do not know what a firm's subcontracting capabilities are and yet they must use a firm in order to comply with an assigned project goal. Therefore, we recommend a capacity rating system be developed for all subcontractors, be they minority or non-minority.

Another problem area is scheduling. When the contract is awarded during the winter, the prime contractor establishes a preliminary work schedule. The DBE/WBE sets a schedule according to the prime contractor's schedule, and bids on other projects accordingly. When the prime contractor starts on a project in the summer, he often juggles his schedule to fit other projects he picked up over the winter. If the weather is unfavorable on a project in one area of the state, the prime contractor may move on to another project. Instead of completing one project and then moving on to another as the DBE/WBE had originally planned, the firm finds it must be on several projects at one time.

In most cases, DBE/WBEs work at the call of the prime contractor and the work becomes piecemeal. Mobilization costs rise and payments are delayed. Many of the minorities or women who start a company are totally unprepared for realities like the need for working capital, good insurance, a bookkeeper, someone to answer phones, etc. Because they are inexperienced, they don't realize they should include scheduling or payment conditions in their subcontracts.

In our state many firms are started because an individual has a particular skill such as finishing concrete. So he opens a firm to do curb and gutter and sidewalks. While he might be a master at his craft, no one has taught him how to bid, take out loans, or manage his company.

The department has tried to solve some of these problems by offering basic training courses in the following areas: leadership and motivation; oral and written communications; problem-solving and decision-making; using contract documents; planning and scheduling; cost awareness and production control; project safety and loss prevention; project management; changes, claims and negotiations; and productivity improvement. Annually, two to three units of the Associated General Contractors supervisory training program are offered at various locations throughout the state. Historically only 20 to 25 firms take advantage of these courses. It is apparent, however, that those who have attended classes have taken what they learned back to their firms and implemented it.

Costs

We have not conducted a study to determine if there have been additional costs to the federal-aid highway program as a result of implementation of section 105(f).

We do know that additional costs were incurred in the following areas, but no dollar value has been assigned:

1. Project personnel, whose previous responsibilities were as inspectors or project engineers, are now additionally monitoring DBE/WBE participation, and spending time conducting investigations or developing cases for decertification.
2. Administrative and added contract costs are incurred to replace a DBE/WBE who fails to perform on a project. These costs are limited to specific percentages in our special provisions. Because of overextension, scheduling problems and weather delays, we had a large number of DBE/WBE replacements this year.
3. Department staff who previously were not involved in the program commit many staff hours to set goals, monitor good faith efforts, review firms for certification and decertification, etc.

Fraud

North Dakota has been fortunate to have had very few problems with fronting or non-legitimate firms. The DBE/WBE firms which have been questionable generally have come from out-of-state. As noted before we believe a strong certification process reduces the risk of fraudulent use of the program.

Attracting Out-of-State Firms

While out-of-state firms may contribute to a state's participation level, the percentage of participation is low in our region.

Our surrounding states of Minnesota, South Dakota and Montana are quite large in terms of land area, yet are not densely populated near our borders. The logistics of mobilization, from one state to another, precludes many out-of-state DBE/WBE firms from bidding competitively against in-state DBE/WBEs. Most of our firms and those found in surrounding states are small and work within a 100- to 150-mile radius. If an out-of-state firm cannot bid competitively, there is nothing that will entice it to work in our state.

## V. MEETING DBE REQUIREMENTS

North Dakota's minority population is small, just four percent of the total. Additionally, our minority citizens are located primarily on the five Indian reservations in the state, and few minority-owned firms previously existed. For those reasons, we requested and were granted reduced DBE goals for 1983, 1984, and 1985.

We firmly believe slow, steady progress, coupled with the success of reaching and surpassing our reduced goal each year, has led to a relatively positive program in our state. Only when attainable goals are set and aggressive, positive action is taken can we hope to continue our success in promoting disadvantaged business enterprises into the mainstream of the highway contracting industry.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION
HARRISBURG, PENNSYLVANIA 17120

OFFICE OF
SECRETARY OF TRANSPORTATION

18 November 1985

Honorable Steve Symms
United States Senate
Committee on Environmental
and Public Works
Chairman
Subcommittee on Transportation
Washington, DC 20515

Honorable Quentin N Burdick
United States Senate
Committee on Environmental
and Public Works
Ranking Minority Member
Subcommittee on Transportation
Washington, DC 20515

Dear Senators Symms and Burdick:

Thank you for the invitation to appear before your Subcommittee on November 19, 1985. Since I am not able to attend that meeting, I am providing my testimony so that it can be entered into the Senate records.

Sincerely,

Howard Yerusalim

Howard Yerusalim, PE
Deputy Secretary for Administration

Attachment

# Written Testimony

United States Senate
Committee on Environment and Public Works
Subcommittee on Transportation

of

Howard Yerusalim
Deputy Secretary for Administration
Pennsylvania Department of Transportation
1200 - Transportation and Safety Building
Harrisburg, PA 17120

I am pleased to have the opportunity to present this written testimony for inclusion in the Senate Committee's hearing record.

Before I address the eight specific areas requested in your November 8, 1985, letter to me, I would like to make some general comments.

The first of these is that since the passage of Section 105(f) of the STAA of 1982, the Pennsylvania Department of Transportation has exceeded the goals of 10% for Disadvantaged Business Enterprises (DBE) and a 2% goal for Women Business Enterprises (WBE). We have been able to accomplish this by working with the minority and non-minority community to increase the number of minorities and women who can provide services to the Pennsylvania Department of Transportation. In fact, from April 1983 to the present, we have increased the number of certified DBE and WBE firms from approximately 125 in April 1983 to over 700 today.

We also set realistic goals on a project-by-project basis for Disadvantaged and Women Business Enterprises' involvement. We look at each and every project, the items of work included in that project, and the number of certified Disadvantaged and Women Business Enterprises who perform that type work and are willing to work in that geographic location of the state. We do not have a quota system in Pennsylvania. In fact, if a prime contractor does not meet the goals, we evaluate that prime contractor's good-faith efforts. If we feel that the prime contractor has made good-faith efforts to attain the goals for that project, but is not able to obtain the goals, we award the project to that contractor any way. We have also expanded our prequalification provisions to allow for a "provisional prequalification" for subcontractors. Under provisional prequalification, a Disadvantaged or Women Business Enterprise can work on a particular project in an area where they do not presently have prequalification if the prime contractor will provide support. However, it is clear that the work must be done and managed by the DBE or WBE. We are also at the present time implementing a Mentor/Protege Program so that DBEs and WBEs can work together with established contractors to expand their capabilities. We also make sure that our specifications are available to DBEs and WBEs in sufficient time before a bid opening for them to evaluate the specifications and plans. Our supportive services contractors around the state help with certification and bidding for DBEs and WBEs and have a special provision that provides special money for mobilization to DBEs and WBEs so that they can improve their cash flow position.

We also feel that we have a very strong certification process which will be discussed later in this written testimony. The other key to our program is that we very closely monitor projects during construction to ensure that the DBEs and WBEs are actually doing the work for which they are listed and are not utilized as fronts.

The rest of my testimony will relate to the eight issues requested in your November 8, 1985, letter.

1. **WHAT IS THE CAPACITY FOR DISADVANTAGED BUSINESS ENTERPRISES (DBEs) AND WOMEN BUSINESS ENTERPRISES (WBEs) FOR HIGHWAY CONSTRUCTION WORK?**

   Our most recent DBE Directory contains over 700 certified DBE and WBE firms. A total of 137 of these firms are prequalified to perform highway construction work. The total capacity of the prequalified DBE firms is approximately 75 million, and the total capacity of the prequalified WBE firms is approximately 50 million at any one time. Most of the other firms provide engineering design services, supply materials, manufacture products or provide other construction-related services that can be credited toward the DBE and WBE goals. Through the mix of prequalified firms, materials suppliers, manufacturers and engineering firms, we have been able to exceed our DBE and WBE goals. Although we have exceeded our DBE and WBE goals for the past three fiscal years, we are still trying to attract more DBEs and WBEs to participate in the program. In short, we have enough DBEs and WBEs to meet the present goals.

2. **CURRENTLY, HOW MANY DBEs AND WBEs ARE PREQUALIFIED AS PRIME CONTRACTORS FOR HIGHWAY CONSTRUCTION WORK? HOW CAN MORE DBE AND WBE FIRMS BE DEVELOPED AS PRIME CONTRACTORS?**

   Currently, we have 25 DBEs and 25 WBEs who are prequalified to bid as prime contractors on highway construction work. We are attempting to develop more DBE and WBE firms by allowing for "Provisional Prequalification" and initiating a "Mentor/Protege Program."

What this has allowed has been the expansion of the areas in which DBEs are prequalified. After one or two projects working under this provisional prequalification, the DBE may develop his or her own expertise so that they can become prequalified on their own and not need the support of a prime contractor. Gradually, the DBE will acquire the experience and the capital to become a prime contractor.

We have drafted guidelines for the initiation of our Mentor/Protege Program, and we are currently awaiting approval from FHWA. The Mentor/Protege Program is a program where a successful prime contractor would team up with a disadvantaged firm so that he could give them guidance and help them with equipment and training so that they can grow. The intent of the Mentor/Protege Program is that, through the prime contractor's help to the disadvantaged firm, the disadvantaged firm can learn new areas of contracting and grow so that after some time period, there will be no need for a Mentor/Protege contract. They will be able to act on their own and gradually become prime contractors, if they so desire.

3. WHAT EFFECT HAS THE SECTION 105(F) PROGRAM HAD ON NON-MINORITY SPECIALTY CONTRACTORS AND WBEs? IF THERE HAVE BEEN ADVERSE EFFECTS, HOW SHOULD THEY BE ADDRESSED?

I am concerned that the program has had an adverse effect on certain non-minority specialty contractors. It appears that on every project that includes landscaping or guiderail, a DBE or WBE is named to perform that work. This has forced some non-minority specialty contractors out of business. Since we do not and cannot dictate to a prime contractor what items he will subcontract in Pennsylvania, I do not know the long-term solution to this problem. I do know that the primary efforts to correct this situation should be on the shoulders of the prime contractors. If they really want the non-minority specialty contractors to survive, then they must choose areas other than landscaping and guiderail for subcontracting to DBEs and WBEs. I'm also hopeful that solutions may occur through our Provisional Prequalification and our Mentor/Protege Program, both of which were discussed earlier.

4. WHAT KIND OF CERTIFICATION PROCESS FOR DBE AND WBE FIRMS SHOULD BE REQUIRED? SHOULD THE PROCESS BE UNIFORM FOR ALL STATES?

   Meaningful certification requires a thorough analysis of a company's operations. Independent verification through on-site visits to company headquarters and on-the-job monitoring are essential to see that only bona fide DBEs are certified and, once certified, to be certain that these DBEs perform the contracts with their own management and work force.

   As the Surface Transportation Act of 1982 and the regulations promulgated thereunder established the same limitations for all recipients, a nationwide uniform certification, verification and monitoring system would help to avoid the wide disparities that currently exist in the administration of this program.

5. WHAT KINDS OF TRAINING, FINANCIAL OR OTHER TECHNICAL ASSISTANCE ARE NEEDED BY DBE AND WBE FIRMS? SHOULD THIS KIND OF ASSISTANCE QUALIFY TOWARDS THE TEN PERCENT GOAL?

   In addition to our Provisional Prequalification and our Mentor/Protege Program, we also provide mobilization payments to assist DBEs and WBEs with start-up capital. Although mobilization helps and loans are available from the Pennsylvania Minority Business Development Authority, a lack of access to capital continues to plague most DBEs and WBEs. We have three supportive services contractors throughout the State, one located in Pittsburgh, one located in Philadelphia and one located in Harrisburg. They provide management, technical and financial assistance to DBEs and WBEs within their respective regions. All three of the supportive services firms are DBEs, and the contracts for the services that they provide are credited toward the ten percent goal.

6. WHAT, IF ANY, ADDITIONAL COST DOES THE SECTION 105(F) PROGRAM ADD TO THE FEDERAL-AID HIGHWAY PROGRAM?

   Undoubtedly, the section 105(f) program has added some additional costs to the Federal-aid highway program; but both the Federal government and the State are willing to spend a little bit more money in order to make this program work as it was intended. In Pennsylvania, we do not accept a prime contractor's rejection of a DBE quote solely because it was not the lowest quote received for a particular item. If there is a very small percentage between the DBE price and a non-DBE lower price, then we would expect prime contractors to select the DBE. However, if a prime contractor feels that the lowest DBE quote is out of line with the quotes received from non-

DBEs, we would expect the prime contractor not to select the DBE. Instead, the prime contractor should report this as part of his good faith efforts; and we, most likely, would approve the good-faith efforts where the goals are not met. I estimate the additional cost of this vital program in Pennsylvania at a very modest 1-2%.

7. WHAT, IF ANY, EXPERIENCE HAVE YOU HAD WITH FIRMS THAT DO NOT APPEAR TO BE LEGITIMATE FIRMS? HOW CAN THE FRAUDULENT USE OF THIS PROGRAM BE PREVENTED?

Pennsylvania has reviewed 1,052 DBE applicants and 500 WBE applicants. Forty-eight percent of DBE applicants fail to qualify, and fifty-five percent of WBE applicants fail to qualify. Those companies found to be inadequate fail for a wide variety of reasons ranging from innocent misunderstanding of program requirements to outright fraud. Although a very small percentage of applicants and certified firms fall into the latter category, Pennsylvania has enacted a MBE Fraud Law making fraud in obtaining certification or in obtaining public funds intended for minority contractors a felony punishable by up to seven years in prison. We are considering other actions to prevent not only outright fraud but even the unintentional diversion of DBE funds to non-minorities.

We consider enforcement to be crucial to the success of this program, as the substantial amounts of money involved are sadly a lure to those who would divert rewards intended by Congress for Disadvantaged Business Enterprises (DBE).

A. There are three stages to our enforcement procedures. The first and most important is prevention. The key to our prevention program is education. We award each year a supportive service contract to assist minority business enterprises in successfully competing for work and to aid them, if necessary, in the certification process. Our supportive service contractors are alert to potential false front activities, and they can guide legitimate minority businesses away from illegal entreaties they might receive from non-minority contractors.

Our Office of Inspector General has initiated an education program to train the Department's project people on key indicators of fronting activities, so that these men and women who are actually on the job will be better able to detect fraudulent activity and report it. At the same time, we have conferences statewide to educate majority as well as minority contractors on the appropriate ways to fulfill minority goals; and we have stressed the importance of eliminating front activities. Fronting activities now constitute a felony in Pennsylvania as a result of our new DBE Fraud Law passed early this year with the active support of our Department.

While we actively seek to assist all new applicants for certification, we also send each minority business a copy of the DBE Fraud Law. As a felony, DBE fraud is punishable in Pennsylvania by up to seven years imprisionment.

B. The second leg of our enforcement program is detection. Our project personnel, who are actively engaged in each of our projects, have been instructed to immediately contact the Inspector General or the Bureau of Equal Employment Opportunity (BEO) in the event they notice any suspicious activity regarding a minority subcontract. In addition, our BEO routinely monitors affirmative action programs and is alert for the potential of abuse in the DBE Program.

Our Office of Inspector General actively investigates not only the allegations received from our own personnel and private citizens, but it also routinely monitors activities of those minority businesses which most significantly participate in the program across Pennsylvania. The Inspector General actively seeks the assistance of the Attorney General of Pennsylvania, as well as the United States Attorneys and the Federal Bureau of Investigation in criminal investigations and prosecutions.

C. The third and final leg deals with our efforts to eliminate fronting activities entirely. We have several tools to accompany this goal. The first is decertification. Whenever fronting activities are detected, our Office of Inspector General will investigate and, if warranted, recommend decertification to our Department's Appeals Committee. This committee will not hesitate to decertify those firms not complying with federal regulations.

Secondly, we actively seek to debar those non-minority firms which conspire to meet DBE goals through a front company.

Third, we support the criminal prosecution of false front companies. This process is just now starting in Pennsylvania. In some instances, search warrants have been served, and we anticipate arrests within 30 days. Our Inspector General is engaged in discussions with the Office of the United States Attorneys for the pursuit of civil damages under the Federal False Claims Act against those prime contractors who have been awarded substantial federal-aid contracts based upon false information which they supplied concerning the participation of minority businesses.

The program could be further strengthened by contract language providing for liquidated damages and penalties in the event prime contractors fail to meet DBE responsibility.

More federal guidance is needed on the issues of DBE credit for equipment rental, material purchases, leased employes, transportation costs, and brokers.

Federal prosecutors would benefit from strengthening federal laws to improve the potential for conviction where DBE funds are willfully diverted to non-minorities.

8. HOW HAVE STATES WITH SMALL MINORITY POPULATIONS BEEN ABLE TO MEET THE DBE REQUIREMENTS? WHAT, IF ANY, PROBLEMS HAVE THEY HAD IN ATTRACTING OUT-OF-STATE DBE FIRMS?

Since I do not represent a small State with a small minority population, I do not feel qualified to testify with respect to this item.

In summary, we have been meeting the goals and the intent of Section 105(f) of STAA of 1982. While there are problems inherent in a program such as this, we feel with adequate effort, as discussed above, these problems can be resolved.

STATE OF SOUTH DAKOTA
EXECUTIVE OFFICE

WILLIAM J. JANKLOW
GOVERNOR

November 22, 1985

The Honorable Steven D. Symms
Chairman, Transportation Subcommittee
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Re: 11/19/85 Hearing on Reauthorization of Highway Program: DBE Issues

Dear Mr. Chairman:

The State of South Dakota recommends that legislation reauthorizing the Federal-aid highway program not include provisions such as section 105(f) of the Surface Transportation Assistance Act of 1982, a provision which has the practical effect of reserving a portion of highway contract funds for "disadvantaged" contractors (contractors owned by minorities or others designated as "disadvantaged"). In taking this position, I emphasize that South Dakota is deeply committed to providing equal opportunity in all phases of life, including highway contracting.

South Dakota has demonstrated this commitment through its very vigorous implementation of the requirements of section 105(f). We have a solid record of compliance with the 10% disadvantaged business requirement of the Surface Transportation Assistance Act. The Federal Highway Administration has recognized these efforts by presenting a special commendation award to the South Dakota Secretary of Transportation for our achievements in the DBE program.

South Dakota has taken a consistent and thorough approach to the DBE requirements. We have tightened our enforcement of the eligibility standards through careful review of applications and with a program of constant and thorough on-site reviews of DBE firms and their project activity. We have instituted a program of careful field monitoring of project activity of DBE firms and their relationship to prime contractors. We have conducted training sessions for DBE firms and provided technical/managerial assistance.

Even with all this we believe that section 105(f) should be allowed to expire at the end of fiscal year 1986 for two simple reasons. First, we believe that the section 105(f) program unfairly limits contracting opportunities to businesses which are not "disadvantaged". Putting aside legal questions of whether non-discrimination requirements of the United States Constitution are met in the context of such a program, we believe that it is bad policy to create distinctions between businesses such as are created by section 105(f). In particular, we believe that some small contractors which are not "disadvantaged" have been affected seriously and adversely because the 105(f) program makes it more difficult for them to obtain awards.

Second, section 105(f) is inconsistent with the fundamental notion that the federal highway program is funded by highway users, through user taxes, for highway purposes. Section 105(f) has nothing to do with delivering highway services. It, instead, establishes a regulatory burden which makes it administratively more complicated and expensive to deliver highway services. With section 105(f) as part of the highway program, highway users, not the general taxpayer, must pay for policies that are pursued for general, not highway purposes.

Lastly, we particularly oppose extension of section 105(f) as worded. If the provision is extended without change, we consider it likely that the U.S. Department of Transportation's (DOT's) rules implementing that statute (49 U.S.C. § 23 Subpart D) would be continued without change — and we have some difficulty with those rules. In particular, DOT's rules generally provide that states are to establish a goal that at least 10% of funds for federally assisted highway contracts be distributed via contracts let to disadvantaged businesses. A state may establish a goal of less than 10%, but only if it goes through significant paperwork and justification, and special approval by FHWA. This special justification process applies even if the state's minority population is less than 10% (South Dakota has a minority population of roughly 8%). In short, DOT's rules do not adequately distinguish between the ability of states with 8% minority populations and those with 20% minority populations to let 10% of highway contract dollars to disadvantaged small businesses. Thus, we agree with the statement made at the November 19 hearing by the Idaho Department of Transportation (statement, page 9) that: "The imposition of a flat 10% goal uniformly over the entire nation regardless of state or regional minority availability is not equitable." Therefore, even if the Congress should disagree with us and continue section 105(f), it should at least modify the statutory language in a way which would ensure that states with small minority populations are not asked to make a disproportionately large contribution in support of the provision. One way to do this would be to include in any statutory provision extending section 105(f) language explicitly prohibiting the USDOT from requiring any state to establish percentage DBE goals higher than the percentage of that state's population which is comprised of minorities (as presently defined).

Page 3
November 22, 1985

We thank you for your consideration of our views and respectfully request that this letter be included in the record of the Subcommittee's November 19, 1985 hearing.

Sincerely,

cc: Senator Quentin N. Burdick
Ranking Minority Member

Ms. Jean Schrag Lauver

# STATEMENT FOR SUBMITTAL TO THE
# SUBCOMMITTEE ON TRANSPORTATION

## SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Relating to

## An Assessment of the Disadvantaged Business Enterprise Requirements of the Surface Transportation Assistance Act of 1982

by

Mark G. Goode

Engineer-Director

State Department of Highways and Public Transportation

State of Texas

December 4, 1985

for Submittal to the Record of the
Public Hearing of November 19, 1985.

Insurance and bonding have been, and continues to be, a restriction to the DBE's and WBE's seeking to obtain Federal-aid highway construction subcontracts. Successful completion of subcontracts suited to the capacity of a small firm can lead to establishing credibility with a surety and an expansion in bonding limit. However, we are aware of instances where a firm has obtained a work volume beyond its capacity and failure to complete has severely restricted that firm's ability to obtain bonding for additional work.

How many DBE and WBE prime contractors are bidding, and how many more may be developed?

At least seven (7) DBE firms have submitted bids during the last three (3) months. At least three (3) WBE firms have submitted bids during this same 3 month period.

There are at least six (6) other DBE firms that are, or which have been, financially prequalified. Certainly there are other DBE and WBE firms that can develop into prime contractors but we are unable to identify which firms. Part of the objectives of the three (3) active support service contractors is to identify DBE firms that have such potential and, through training and technical assistance, promote the development of these firms.

What effect has the DBE program had on non-minority specialty contractors and WBE's? How should adverse impacts be addressed?

From this Department's vantage point, we are unable to verify or refute the allegation that non-minority subcontractors have been adversely impacted by the DBE/WBE program. Only occasionally do prime contractors approach the subcontracting limit of 50 percent used in Texas. Our DBE and WBE subcontract commitments have only achieved 12.87 percent and 1.03 percent, respectively, of our Federal-aid contract dollar volume. This indicates prime contractors still had room for additional subcontracts. It would appear that any reduction in non-minority subcontract work is a result of decisions made by prime contractors to perform as much work as possible with their own personnel during a period of reduced work volume experienced by this Department in the recent past.

What kind of certification process should be required and should it be uniform in all States?

The present Schedule A form, with provision for recipients to expand the number of questions to address specific needs for their DBE/WBE programs, seems to be workable and sufficient by uniform nationwide.

November 19, 1985

STATEMENT OF SUBMITTAL OF

Mark G. Goode

Engineer-Director

STATE HIGHWAY AND PUBLIC TRANSPORTATION COMMISSION

SUBCOMMITTEE ON TRANSPORTATION

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

As Engineer-Director of the Texas Department of Highways and Public Transportation, I am pleased to offer this statement for the record of the public hearings of the Subcommittee on Transportation of the Senate Committee on Environment and Public Works. This statement will address some of the major concerns and the Texas experience with regard to the Disadvantaged Business Enterprise provisions [Section 105 (f)] of the Surface transportation Assistance Act of 1982.

## What is the capacity of DBE's and Women Business Enterprises for highway construction work?

The capacity of the Disadvantaged Business Enterprises (DBE's) and Women Owned Business Enterprises (WBE's) in this State is being severely taxed by the volume of work we are presently able to place under contract and by the restraints that are common to small, developing business entities.

We are aware, through actual case histories, of DBE subcontractors that are unable to complete their subcontracts because of cash flow problems. It appears that short term operating capital is the problem. These resources are necessary, on an on-going basis, to meet weekly payroll requirements, payment for supplies (other than major material purchases) and for equipment procurement and operation either through rental, lease or purchase. Credit capacity for major material purchases also limits their capacity. This Department has approved joint purchase orders and joint checks for payment of materials where the prime contractor stands behind the purchase and payment for materials made by the DBE. This has provided a line of credit to many DBE firms and allowed them to undertake more significant work, but it does illustrate a definite problem with a small business in expansion of their capacity for additional work.

The lack of accurate cost records on construction work items impacts the ability of many DBE's and WBE's to negotiate reasonable subcontract prices for the work required. Through the medium of supportive services contracts awarded and administered by this Department we are providing assistance to these firms in the establishment of cost record systems that will provide accurate costs for estimating labor, equipment, material and overhead costs of items of construction work. This endeavor has aided many DBE's and WBE's in improving their cost records, while at the same time revealing that many had no records, or very poor records, which impacted their ability to produce reasonable bids.

The major problem encountered is that the eligibility standards in the Federal regulations for this program are somewhat indefinite in some areas. For example, the regulations require a certified firm to be independent. How independent? Many of our present prime contractors were supported to some degree by an existing contractor in their beginning. In another standard, the disadvantaged individual's contribution of capital or expertise must be real and substantial. These are undefined. Also, recipients are required to determine the adequacy of the DBE/WBE's resources for the work. We are not contractors and cannot judge what are adequate resources. Firms can show negative assets but can operate on borrowed money. These three examples show that recipients are required to render certain judgements and these judgements usually will be on the lenient side to avoid being accused of denying someone opportunity to participate in a Federal program.

What kind of training, financial or other technical assistance is needed by DBE AND WBE firms?

In our opinion, DBE and WBE firms need training and technical assistance in the areas of identifying available work suited to their capabilities, in estimating and bidding work, in arranging for operating capital, in finding bonding, and in obtaining adequate accounting assistance for their firms. Our three supportive service contracts are intended to provide some training and/or technical assistance in each of these areas.

What, if any, additional cost does the Section 105(f) program add to the Federal-aid Highway Program?

We are unable to attribute positively any cost increases to the DBE/WBE program. For the first 12 months that this Department operated under a 10 percent DBE goal, our cost index was essentially unchanged. In the following 19 months, our cost index has risen approximately 24 percent. This increase came during a period when our construction program doubled reaching $1.4 billion. We believe the increase was primarily the result of a greater volume of work allowing contractors to be more selective in the type of work bid and to increase his bid unit prices to regain a more reasonable profit.

How can fraudulent use of the DBE program be prevented?

It is believed that use of ineligible DBE/WBE firms can be minimized by the following.

1. Very careful and thorough review of the firm's application for certification.

2. Eligibility review of DBE/WBE's to determine that their organization is structured and operates as depicted in their Schedule A.

3. Project site review of performance as a contractor or sub-contractor to verify independence, control by disadvantaged individual(s), and commercially useful function.

4. Monitoring by personnel in charge of construction project daily verifying same items named in No. 3 above.

5. Use of supportive service contractors to assist DBE/WBE's in structuring and operating their firms in a manner that establishes their eligibility.

6. Verifying that DBE/WBE firms actually received payments indicated in monthly reports by reviewing prime contractor's cancelled checks.

How have States with small minority populations met DBE requirements, and what if any problems have been encountered in attracting out-of-state DBE firms?

Not applicable to Texas.

CASTLE
CONSTRUCTION CORPORATION
10340 South Western • Chicago, Illinois 60643

(312) 238-5175

November 18,1985

The Honorable Steve Symms
Sub-Committee on Transportation
Dirksen Building
Room 406
Washington, D.C.

RE:STAA-1986;105f

Dear Senator Symms,

Enclosed please find documentation which I would like to have included in the testimony which you will be hearing tomorrow.

Although Castle Construction Corporation, a WBE, is specifically excluded from the 105f provision of the STAA Act, I believe that my testimony is, nonetheless, appropriate.

The program can and will work as long as the government requires the majority contractors to deal with minorities and women. The construction industry has, historically, been a white male dominated field. The only way that minorities and/or women have been able to "break-in" has been through these programs. Once the majority contractors have dealt with us for a few years, it is amazing the change in their attitude --- it is positive. It is as though a light bulb has been lit and most realize that we can indeed do the work. ALL WE HAVE NEEDED WAS THE OPPORTUNITY TO PROVE THAT WE CAN GET THE JOB DONE. In the past it has been easier to deal with the "guys from the 19th hole" or somebody's "Uncle Harry" than to instigate investigations for new subs.

In the documentation I have included, it is evident that no WBE's (and I would assume the documentation is similiar for minorities) have received even ONE subcontract without the program. The program must be continued --- hopefully this time it will include WBE's.

Sincerely,

MARILU MEYER
President
enc.

BEST COPY AVAILABLE

University of Chicago

Graduate School of Business
1101 East 58th Street, Chicago, Illinois 60637

October 17, 1984

## Comment on the
## Castle Construction Corporation Economic Disadvantage Report

In my professional opinion, the "Economic Disadvantage Report" strongly suggests that as a result of being a women business enterprise (WBE), the Castle Construction Corporation (CCC) has suffered a competitive disadvantage in obtaining Illinois Department of Transportation (IDOT) bids. The analysis is based on the fundamental statistical method of comparison; the underlying idea is to compare the performance of CCC with that of a non-WBE counterpart which is otherwise identical. Although such a perfectly matched counterpart does not exist, the report approximates the ideal comparison by comparing CCC with a "control group" of non-WBE companies which are closely matched to CCC based on all available information. The sample information is persuasive evidence that every single company in the "control group" obtained many more IDOT contracts than CCC. The WBE nature of CCC is the only identifiable systematic difference available to explain the observed competitive disadvantage.

Edward Ian George
Edward Ian George
Assistant Professor of Statistics

## APPENDIX II

### Statistical Study Proving Social Disadvantage

During the past three years, Castle Construction Corporation (hereinafter referred to as Castle), a Woman Business Enterprise (WBE), has submitted over three hundred bids to various general contractors who had been awarded contracts by the Illinois Department of Transportation (IDOT). Despite this sedulous effort, I have not received a single award on any IDOT contract that did not specifically contain a WBE participation requirement.

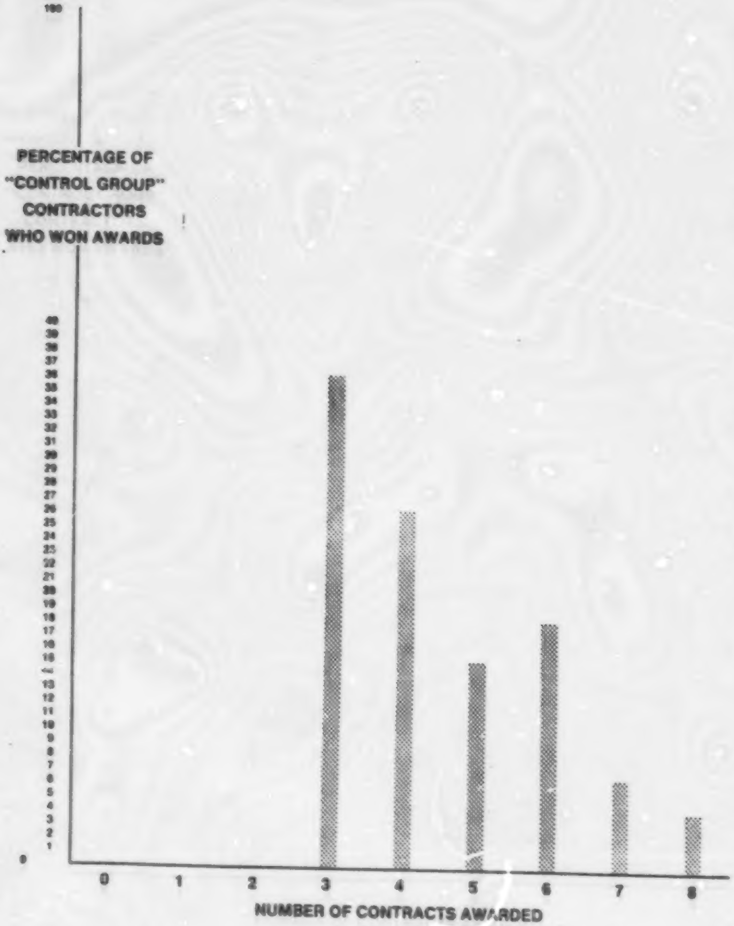
In an attempt to identify the reason(s) for Castle's less-than-impressive track record, I hired my nephew (Greg Meyer, a recent Marketing graduate from the University of Illinois who was at the time unemployed) to do some research. After consulting with Edward Ian George (Assistant Professor of Statistics, University of Chicago) regarding the professionally accepted methods of conducting such a project, Greg developed and implemented the statistical study described in detail on the following pages.

The results of this study clearly bear out my initial susupicion that the most substantial explanation for Castle's dearth of IDOT contract awards was also the most obvious explanation: it is female-owned.

Briefly, the study was undertaken in order to determine if the female-owned status of Castle was, indeed, a major factor explaining my lack of IDOT contract awards. In order to do this, Greg first had to define a control group with which to compare Castle. This group consisted of other construction companies that were similar to Castle in most every respect except that they were male-owned instead of female-owned.

The results, which are graphically depicted on the enclosed chart, speak clearly: each member of the control group had been awarded a minimum of three contracts, with the average number of awards for the group being greater than four, while Castle had none. In the words of Assistant Professor George, "The WBE nature of CCC is the only identifiable systematic difference available to explain the observed competitive disadvantage."

And, indeed, this is a disadvantage: a competitive, or economic disadvantage directly hindering my ability to compete profitably in the marketplace. This economic disadvantage, however, is a direct result of the social and economic disadvantage that I have suffered due to my gender. The Small Business Act clearly defines this type of disadvantagement in regulation 13 CFR Section 124.1-1 (c) (iii) (E) (3) when it states that "SBA shall consider as evidence of an individual's social disadvantage ... discrimination in receipt (award and/or bid) of government contracts..."
I trust you will follow these guidleines when considering my case.



The average number of contracts awarded to each control group member was 4.381.

## STATISTICAL STUDY

### Methods and Procedures

Purpose of our study was to determine the percentage of contractors who have been awarded contracts by the IDOT,or by General Contractors who has contracted with the IDOT.

### A. Establishing a Control Group

To establish a list of economically similar competitors, the following steps were taken.

1. A list of all prequalified contractors was obtained from the State of Illinois Department of Transportation, Bureau of Construction. This list included the names of 1200 contractors, showing the types of major construction that each was qualified to perform.

2. From this list of 1200, we determined our control group by using the following process:

   a) We eliminated all contractors whose phone number was not within the (312) area code. We justified this action by determining that most contractors perform the majority of their business within a given radius of their office location. This also allowed the researcher to work with smaller numbers, while not sacrificing the dependability of the sample.

b) We eliminated all Disadvantaged Business Enterprises (DBEs) and Woman Business Enterprises (WBEs) on the basis that they were not part of the reference group against whom we wished to prove our disadvantage. Also, our preliminary investigation indicated that all WBEs were also at a competitive disadvantage.

c) We eliminated all contractors who were not qualified in at least one of the following major construction areas:

1) Excavating and grading
2) Surfaces bases
3) Highway structures
4) Miscellaneous concrete construction

We concentrated our study on contractors who performed in these areas since Castle is prequalified in all of these areas. It should also be noted the majority of firms are prequalifed in at least one of these areas, therefore, this population would be representative of our direct competition in the bidding process.

d) We eliminated all large General Contractors who have characteristically submitted bids for more than $250,000. These contractors were not deemed to be our competitors, since Castle is prequalified to a maximum of $250,000 per bid.

B. The Study

1) A sample of over 200 contracts was gleaned from the records at the IDOT District One office in Schaumburg, Illinois. Randomness was obtained by rolling a die to determine which contracts were to be selected for the sample, all of which were selected without regard to DBE or WBE status.

The sample was taken from a ten-volume index of all contracts in District One. The researcher began with the most recent volume and worked in reverse chronological order picking samples until 200 contracts were recorded. This process brought the sampling back to March, 1981.

2) Each contract selected for the sample was recorded by letting date, contract number, and the names of all the

participating contractors.

3) In the next step of the analysis, the researcher cross-referenced all members of the control group (derived earlier from the list of prequalified contractors) with the contractors who were awarded work in any of the sample contracts. From each sample, only those contractors who performed as subcontractors or as general contractors on awards of less than $250,000 were used. The results of this cross-reference gave us the distribution of awards to each contractor.

4) Upon analyzing the data obtained thus far from this study, it was apparent that a significant percentage of the control group did not receive any awards. Ninety-one out of the 180 contractors in the control group did not receive any bids.

It also became apparent that of the remaining 89 contractors who did receive awards, not one of them received fewer than three. The distribution of awards was as follows: 36% received three awards, 26% received four awards, 15% received 5 awards, 13% received six awards, 6.5% received 7 awards and 4.2% received eight or more awards.

5) In order to determine why the 91 contractors from our

control group had not received any of the awards, we began placing phone calls to speak with them directly. For each call, the researcher identified himself by name and as an employee of Castle Construction Corporation of Chicago. The researcher then asked to speak to the estimator or the appropriate party regarding IDOT bids. At this point, many respondents indicated they did not directly, nor indirectly work for the IDOT. Generally, they informed us that were prequalified because it was required or desirable in bidding for work in the private sector or for municipalities.

If my call was subsequently transferred to a more knowledgeable party prior to receiving a definite answer, I again identified myself and asked if the contractor regularly submitted bids to the IDOT or to general contractors who had received awards by the IDOT. To further qualify this, I then asked each contractor if they had bid for contracts more than twenty times in the past three years. None of these contractors who were called were large contractors, (those who regularly bid on contracts more than $250,000) since all large contractors were accounted for as having received awards in our sample.

C. The Results

1. The distribution of contracts awarded to members of the control group was as follows:

36% received three awards

26% received four awards

15% received five awards

18% received six awards

6.5% received seven awards

4.2% received eight or more awards

D. The Conclusion

The results of this statistical study clearly indicate that the control group received a substantial amount of IDOT contracts, while Castle received none. Since the WBE status of Castle was the only identifiable systematic difference available to explain this disparity, it would seem that Castle is suffering from the disadvantage of being a woman-owned business, or a WBE.

What is important to note is that even if a portion of the control group were eliminated, say, for instance, if they were found not to be similarly matched to Castle, the results of the study would still be accurate since all members of the control group had been awarded contracts. For this reason, we can have a high degree of confidence in our statistical comparison.

**Illinois Department of Transportation**
2300 South Dirksen Parkway / Springfield, Illinois/62764

October 5, 1984

Castle Construction Corporation
10340 S. Western Ave.
Chicago, Illinois 60643

To Whom It May Concern:

The Department has reviewed your request to inspect:

> "Certificate of Eligibility of contractors in district one with a financial prequalification rating of approximately $250,000."

The request is denied under Section 7(g) of the Freedom of Information Act which exempts from inspection and copying "trade secrets and commercial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause competitive harm."

The request is also denied under Section 3(f) of the Freedom of Information Act because compliance would be unduly burdensome for the Department and the burden on the Department outweighs the public interest in the information. The reason why it would be unduly burdensome and the extent to which compliance will so burden the operations of the Department are as follows:

> Certificates of Eligibility are filed separately in approximately 1300 contractor files. These files are maintained for contractors statewide in alphabetical order. In order to satisfy the request it would be necessary to manually search each of approximately 1300 files; determine whether the contractor is in District One and whether the contractor is prequalified for "approximately" $250,000; remove certificates for pertinent contractors for inspection by requestor; and then refile the certificates after inspection. Requestor cannot be allowed access to the files because they contain other information exempt from disclosure under the Freedom of Information Act.

If you wish, you may contact John Burke at 217/782-6953 to discuss your request in order to modify it so that it does not seek information exempt under Section 7(g) and so that compliance would not be unduly burdensome on the Department.

This denial may be appealed to the Secretary of the Illinois Department of Transportation. An appeal shall be sent to:

Secretary
Illinois Department of Transportation
2300 South Dirksen Parkway
Springfield, Illinois 62764

Very truly yours,

EJ Kehl

E. J. Kehl
Engineer of Construction

3077L

Certified
Traffic
Controllers
Inc.

**FOR THE RECORD**

Since 1983, Certified Traffic Controllers has been supplying the Heavy/Highway industry with a qualified and responsible WBE enterprise. We provide trained flag personnel and construction signs concentrating our entire business on highway safety. We have brought jobs to an otherwise depressed part of New York State and provided a good income for many who would have never had a chance to make the type of money that construction pays.

We find, however, that the present Surface Transportation Act of 1982 prohibits the ability of women owned businesses, in construction, to get contracts in the Heavy/Highway Industry. DBE's are granted 10% of contracts where WBEs get 2%. When the contractor fills his goal, it boils down to a basic goal vs goal situation rather than a competitive bid situation for which it should be intended.

This is just one example of what women are up against:

Last June, I attended a Legislator's Clambake in our County where I sat with several contractors and banking executives that we do business with. The topic of the DBE/WBE program came up and one of the gentlemen (in the top administration of a large construction firm) informed me (in a very loud voice) that it was the policy of his firm to do everything they could to avoid hiring DBEs and especially WBEs as they intended to keep every dollar for themselves.

Please put the phrase "and women" in this bill and let's give women a chance to compete competitively and responsibly in this industry. We can do it, if we just get the chance.

Thank you for your consideration.

Very truly yours,

CERTIFIED TRAFFIC CONTROLLERS, INC.

Christine M. Joyce
President

CMJ:emm

P.O. Box 105 Andover, New York 14806 (607) 478-8469 directions metropolitan inc.

November 18, 1985

The Honorable Robert T. Stafford
Chairman, Committee on Environment
and Public Works
United States Senate

The Honorable Steve Symms
Chairman, Subcommittee on Transportation
Committee on Environment and Public Works
United States Senate

The Honorable Lloyd Bentsen
Ranking Minority Member
Committee on Environment and Public Works
United States Senate

Directions Metropolitan, Inc. is a 100% minority female construction firm located in Chicago, Illinois. Incorporated in 1982 Directions is the culmination of my experience and education in the construction industry (I have enclosed a brief resume to highlight my credentials).

As a DBE/WBE firm certified by the Illinois Department of Transportation I wish to submit the enclosed comments in support of Section 105(f) and request that this statement become part of the record on the Senate Committee Hearings, November 19, 1985.

Sincerely,

Directions Metropolitan, Inc.

J.L. Bradley
President

JLB/kt

Enclosures

2501 WEST POLK STREET CHICAGO, ILLINOIS 60612 (312) 633-2780

## The Issue

In the midst of all the emotional rhetoric surrounding Section 105(f) of the Surface Transportation Assistance Act (STAA) it is necessary to identify the key issues concerning this legislation. Questions and Concerns about section 105(f) can be divided into two categories:

1. The need for section 105(f)
2. The administration and implementation of section 105(f);

to address statements to these specific issues will provide a clearer and more objective analysis of section 105(f).

## The need for section 105(f)

In that the purpose of section 105(f) as introduced and passed is "to ensure the participation of (small and disadvantaged) businesses in ... massive public spending (programs)" the history of FHWA's DBE Programs prior to this legislation would demonstrate that such a congressional mandate is indeed required to assure STAA funds will reach minority contracting firms. Prior to section 105(f), transportation dollars spent with minority funds grew from .5% in 1975 to 5% in 1982. DBE participation in 1983 was 9.8% after the implementation of section 105(f) (Note: Application of section 105(f)'s minority certification requirements to the list of minority contractors contributing to the 15% participation figure in 1982, may have a substantive change on the percent of dollars which went to legitimate minority firms in 1982. Refer to Appendix I for a more detailed examination).

The facts are clear it took seven years (1975 - 1982) without section 105(f) minority participation in highway contract funds to increase 4.5%; with section 105(f) minority portion increased 5.3% in nine months. This supports strongly the dramatic effectiveness of section 105(f), and points clearly to the need of a congressional mandate to assure participation of DBE's in highway construction spending.

The need for section 105(f) can also be emphasized when a close analysis of the Construction industry is made. Characteristics of the construction industry present an atmosphere which is not conducive to the opportunity for full participation by DBE's.

## The administration and implementation of section 105(f)

The introduction of new requirements has by its very nature problem areas, cost incurrence, trial and error. It would be inconsistent to think or expect the implementation of section 105(f) would be free of these common charateristics.

In like respect it is also incongruous to condemn section 105(f) after only 2 years, when the intent of this mandate is to correct a century of inequity.

The implementation of Section 105(f) in 1983 mandated a complete about face in what and how minority participation in the surface transportation funds would be. In Illinois this resulted in multiple meetings with industry associations, Transportation Department officials, community leaders and minority business. Surely the committee knows such extensive dialogue took much time and was required to work out the bugs in the program. And more time is required to fine tune the program, but eliminating section 105(f) is not the way to fine tune the program.

Non Minority Contractors' oppsition to section 105(f) is strong. They claim that section 105(f) is a social welfare program which

1. is not cost effective
2. has hurt the WBE sector
3. has forced contractors out of business, with specific emphasis on "specialty" contractors.
4. has set "quotas" which are unrealistic because there are not enough capable and qualified minority business to fulfill the goals set by section 105(f)
5. has resulted in the creation of front companies;

and the list I'm sure goes on and on. But as a concerned member of the industry, I have found that the opposition is afraid to put their problems on the table, with substantive facts. They are afraid to develope achievable solutions; instead they present emotionally charged arguments, present weighted examples of abuse, while using inflamatory language.

Take a look at the opposition: It is a body which represents the industry's status quo; their contractors gross 5 to 15 million dollars a year (on the low end); with continued funding of section 105(f) it will take minority and female contractors at least 8 years to reach this goal; It is a body with minute DBE/WBE participation, what percentage of their membership is minority or female? How much time did they allot to developing workable plans of participation in the industry by minorities or females prior to the mandates, in general and section 105(f) in particular? How serious did they think the Federal Goverment was in requiring DPE/WBE participation prior to section 105(f)? What did it take to remove their names from the list of minority and/or female fronts?

As a member of the Illinois Road Builders Association, the general consensus is that my input is only important on the DBE/WBE issues; which was more than demostrated when my request to sit on the committee concerning industry forum was not accepted. The point I make here is that the industry is not receptive to the participation of minorities and females and it was only with the congressional mandates that the industry is opening up. DBE/WBE's are becoming knowledgeable about the "system" thru the discussion concerning section 105(f).

However to address the arguments of those who oppose section 105(f)

1. it goes without saying that there are cost to be associated with the implementation of the legislation. But these costs would be minimized with joint cooperation between the construction industry (majority and minority), the agency and the ligeslature. And the costs in the long run will represent tremendous savings in producing a free enterprise system which is open to the most competitive regardless of race, ethnicity or sex. Surely cost effective can apply to long range benefits concerning the improved quality of life, expanded businesses, and an overall more active economy.

2. As a member of the WBE sector, too, it would enhance section 105(f) to specifically identify WBE's as beneficiaries, however I support separation of WBE goals from DBE goals. In Illinois the Department has interrupted section 105(f) as not applying to WBE's. This interpertation could be detrimental to the WBE sector, and it is evidence of the need to include WBE's in the mandate. The harm comes not from the existence of section 105(f), but from the interpertation.

3. Section 105(f) is unfairly charged with the plight facing contractors today. There are multiple factors contributing to contractors going out of business.

Section 105(f) has never mandated what type of work that should be subcontracted by the prime contractors, just that there is to be participation by DBE/WBE firms. The general and prime contractors are presently in the best position to offer relief to this group of subcontractors. Just as they are in the best position to work with the DBE and WBE in developing good business relationships. The Prime Contractors only call DBE/WBE contractors because there is a requirement; this is not a good faith effort.

4. Section 105(f) has set goals which are achievable; this has been proven. Waiver procedure exist and can be used if the goal can not be attained. In Illinois the waiver procedure was condemned by the majority contractors before it was even tried; that in itself does not demonstrate good faith efforts. Even so the Illinois contractors have been very successful in identifying DBE/WBE firms, and more successful than not in achieving the goal of participation. Illinois DOT has only made it clear that there is a burden on the contractors to try with their best good faith efforts to obtain DBE/WBE firms; because the Department is well versed in the tactics which can be used to simulate good faith, while actually undermining the intent of section 105(f).

In reference to qualified and capable DBE/WBE firms existing. Indeed we do; however the criteria to determine our capabilities is biased; after all it was developed by the industry prior to the actual input of DBE/WBE's. The Transportation officials meet only with the majority associations to discuss IDOT contract requirements. A review of some of these requirements would demonstrate why DBE/WBE have not been able to participate. I have reason to believe that many requirements of the Department are antiquated and adversely effect DBE/WBE firms.

5. Front companies - "oh what a tangled web we weave; when first we practice to deceive". - were not created by section 105(f). The true facts are that section 105(f) established by law the criteria to determine the legitimacy of DBE/WBE firms. A review of minority listings prior to section 105(f) and the minority listing post 105(f) would indicate this legislation has done more to eliminate the existence of Front companies than to perpetuate it.

## SECTION 105(F) - YES

In conclusion, Section 105(f) is a fine piece of legislation, as is the Surface Transportation Assistance Act, and should be refunded. It is an effective piece of legislation, which has established the legislatures commitment to including DBE/WBE's in the funds spent by the Federal Government.

Section 105(f) is a piece of legislation which works. It did what it was intended to do - It ensured the participation of DBE's in ... massive public spending something our "good faith efforts" industry has failed to do in seven years.

A needed bold piece of legislation - An Accomplishment.

Submitted By
Jacqui L. Bradley
President of
Directions Metropolitan, Inc.
November 18, 1985

directions metropolitan inc.

RESUME'

JACQUELINE L. BRADLEY

**OBJECTIVE:** CONSTRUCTION MARKETING/CONTRACT ADMINISTRATION... Qualified to be a determining factor in the growth and profit picture of an aggressive organization.

**PROFILE:** Possess a career of progressively responsible employment within the construction and economic development fields. Assignments span from program auditor and construction accountant to construction manager. Last position as Manager - Minority Business Development selected minority vendors to meet corporate purchasing requirements.

Accordingly, have a comprehensive background in management processes, negotiation and contract administration. Possess a documented record of success and savings in every position held.

Have procured over 24 million dollars in contract awards and approximately 3 million dollars in financial and bonding guarantees for minority contractors in the State of Illinois.

**EDUCATION:** Juris Doctorate (2 years completed towards degree)
DePaul University, Chicago, Illinois

Master Business Administration - June 1977
Roosevelt University, Chicago, Illinois

Bachelors of Arts (Accounting) - May 1975
Loyola College, Baltimore, Maryland

Have accumulated 20 continuing education units (CEU's) in construction contract administration, estimating and scheduling.

2501 WEST POLK STREET CHICAGO, ILLINOIS 60612 (312) 633-2760

FLASHER
BARRICADES

2360 SOUTH 3270 WEST
SALT LAKE CITY, UTAH 84119

(801) 972-4474

SAFETY DEVICES

Senator Jake Garn
5207 Dirkson Building
Washington, D. C. 20510

March 22, 1985

Dear Senator Garn,

As a non-minority specialty contractor who works on highway projects, we have been very concerned about the affirmative action type of minority business programs because they have caused us to lose almost all of our highway construction business. Our specific concern has been section 105(f) of the Surface Transportation Assistance Act of 1982 (STAA), which provided that except to the extent determined by the Secretary of Transportation, not less than 10% of their federal highway funds appropriated by the Act shall be expended with minority businesses (referred to as Disadvantaged Business Enterprises or DBEs).

We understand this provision was, in part, designed to increase jobs in the minority communities by giving more business to minority firms. Prior to 1983 prime contractors were required to make "good faith efforts" to give subcontract work to minority firms. Under the "good faith efforts" regulations, minority contractor participation increased substantially in the early 1980's. When section 105 (f) was legislated, it increased the required DBE participation by four times overnight because the percentage of participation was substantially increased at the same time that the federal highway funds were substantially increased. As discussed in detail below, the substantial increase in required DBE participation has resulted in non-minority specialty contractors being unable to get work.

I think we all agree that ALL contractors should have an equal opportunity to compete for contracts. Section 105(f) of the STAA goes well beyond equal opportunity. It guarantees 10% of the funds will be expended with DBEs. Many civil rights advocates believe that this type of "affirmative action" is necessary to remedy past discrimination. While most non-minority contractors feel congressionally required affirmative action contract goals or quotas upset the competitive bidding system, many of us have come to realize that some type of affirmative action program will likely be mandated until minority firms have a greater share of the market.

FLASHER
BARRICADES

2360 SOUTH 3270 WEST
SALT LAKE CITY, UTAH 84119

(801) 972-4474

SAFETY DEVICES

The entire highway construction industry has been affected by the DBE requirements. However, the specialty contractor has been the one who has paid the vast majority of the price for this program to date. The 10% goal or quota may not seem like much, except when you examine the impact on non-minority speciality contractors. For them, the 10% DBE goal is taking away about 99% of their business.

I feel certain the general public is unaware that in highway construction the prime contractor, who contracts directly with the State Department of Transportation, has historically done a very high percentage of the work with its own forces. In many cases the prime contractor does about 90% of the contract. In cases where the percentage is less, it is because there is a large subcontract of another major type of construction. For example, a grading contractor may need to sucontract paving. Small specialty contractors have historically performed a small percentage of the overall contracts.

Under the 10% requirements of Section 105(f), prime contractors have been required by the State Department of Transportation to meet goals on specific contracts. Naturally, they have subcontracted to DBEs almost all the work that has been done by small specialty contractors, even when our quote is the low one.

Although our industry would favor free and open competition with equal opportunity for all, we have attempted to come up with positive ideas to improve the present program for legitimate DBE firms and reduce the pressure on the specialty contractors. We recommentd the following:

1. SET REALISTIC CONTRACT GOALS. Federal Regulations 49 CFR 23.45 require the State to set annual goals and set goals for specific contracts based on the "KNOWN AVAILABILITY OF QUALIFIED DBEs". We believe the great majority of States, including Utah, are not setting contract goals based on the known availability of qualified DBEs. Instead, they are setting goals that will meet the 10% goal and then closing their eyes on how the goals are being met.

According to 49 CFR 23.64 the State requests annual goals for approval 60 days before the beginning of the Federal fiscal year. A State may request a goal of less than 10% by submitting a justification for its request and having the request signed, or concurred in, by the Governor.

FLASHER
BARRICADES

2360 SOUTH 3270 WEST
SALT LAKE CITY, UTAH 84119

(801) 972-4474

SAFETY DEVICES

We strongly urge that goals for specific contracts for the balance of this fiscal year be based on the capacity of the legitimate DBE firms. Although Utah may not achieve even close to 10% participation, it will have an honest program for which we can all be proud. The State of Utah will also be helping the legitimate DBE firms who will be better able to compete for work. Then, 60 days before the begining of the next Federal fiscal year, the State of Utah should request realistic goals for next year.

2. DEVELOP ADDITIONAL DBE CAPACITY IN MAIN LINE CONSTRUCTION WORK. Since 99% of work being done by DBEs now is specialty work, an effort should be made to train and assist qualified DBEs doing paving, grading, manufacturing, and steel fabrication done exclusively by non-minority firms. This will give DBE firms the opportunity to enter the "main stream" of this industry and will create more jobs in the minority community.

3. TAKE THE SPECIALTY WORK OUT OF THE CONTRACT AND AWARD SEPARATE CONTRACTS FOR THAT WORK. Most large building contracts now have separate prime contractors; a building contractor, a mechanical contractor, etc. A building contractor acts as the manager. In highway construction there could be separate prime contracts for individual items of work. This will give non-minority specialty contractors a change to obtain some work.

4. USE SET ASIDE CONTRACTS. Under the law, whenever the prime contractor is a DBE, the State receives credit for the entire amount of the contract. This would mean a contract that is within the capacity of qualified DBEs would be limited so that only DBEs could bid on the project. This would increase DBE competition and increase the bidding ability of DBEs. It would also help the State meet the overall goals. The DBEs would be prime contractors in these instances and would have the opportunity to subcontract specialty work to the low bidder.

5. ALLOW DIFFERENTIAL CREDIT FOR ACHIEVING CONTRACT GOALS. One State is considering allowing the prime contractor 50% credit toward goal for specialty work and 150% credit toward goal for prime contractor type work. This encourages prime contractors to train and assist DBE firms in the "main strean" type of work.

6. SPECIFY A SPECIFIC NUMBER OF DBE CONCERNS THAT MUST BE USED TO ACHIEVE GOALS ON EACH CONTRACT. This would spread work out over more areas and more people.

**FLASHER BARRICADES**

7360 SOUTH 3270 WEST
SALT LAKE CITY, UTAH 84119

(801) 972-4474

SAFETY DEVICES

7. PROVIDE THAT NO MORE THAN A SPECIFIED PERCENTAGE OF SPECIALTY WORK CAN BE USED TO MEET THE DBE GOAL. For example, if the DBE goal on a specific contract is 10%, the State could require that no more than 1/2 of the 10% may come from the specialty areas.

These ideas are not original with us. We have heard them from others, including officials of the FHWA. What these ideas need is more discussion and support from those with political clout. I have taken the liberty of enclosing an editorial written by Cordell M. Parvin which addresses some of thse problems.

We want the DBE program to work. It should work. It needs to work.

We do not want any more specialty contractors to go out of business when the obligation can be spread among many and we all make a living.

We are aware it will be some time before the new Transportation Bill will be debated by the full Congress, but perhaps there might be input into the proper committees at this time.

May I hear from you? How do you feel about these suggestions? May I give you or your staff any help or information in working on this problem? Have you any suggestions for us that we might use to make the program work?

Thank you for your interest and help.

Sincerely,

Dean R. Stephens

Dean R. Stephens
Flasher Barricades, Inc.

BEST COPY AVAILABLE

**Illinois Association of Women Contractors**

November 18, 1985

Honorable Senator Steve Symms
United States Senate
Committee on Environment and Public Works
Subcommittee on Transportation
Washington, D. C. 20510

Honorable Senator Symms:

Re: Surface Transportation Assistance Act of 1982
Section 105(f)

The Illinois Association of Women Contractors is vitally interested in the reauthorization of Section 105(f) of the STAA82. We sincerely request that you and your committee consider the economic impact of this legislation upon Women Contractors in Illinois and throughout the country.

We would like to stress that this program is working in Illinois! The administrative personnel required to implement and monitor this program is in place and performing expediciously and efficiently to the benefit of both the prime contractors and the WBE/MBE Subcontractors. Indeed, the mechanics for this legislation have been put in place and are performing to the purpose for which it was intended.

Also, it is important to note that this is being done in a Cost Effective manner based on the same historic competitive bidding process inherent in the construction industry. WBE/MBE Subcontractors submit competitive subcontract quotes to prime contractors, thereby maintaining cost effectiveness for construction projects.

The I.A.W.C. requests that you vote for reauthorization of Section 105(f) of the STAA82.

We look forward to your response.

Very truly yours,

Dorothy S. Lashmett, President

DSL:bl

cc: Sen. Robert T. Stafford, Chrmn., Senate Committe on Environ. & Pub.Wks.
Sen. Paul Simon
Sen. Alan Dixon

Second Vice President
Barbara Morrissey
P.O. Box 67
Godfrey, IL 62035

Secretary
Karen Matan
11203 S. Naperville
Plainfield, IL 60544

Treasurer
Patricia Low
4054 Grove Avenue
Western Springs, IL 60558

Judith L. Kress, Owner of
Kress Contracting Company
Pittsburgh, PA 15212
(412) 766-0856

November 7, 1985

Senate Public Works Committee
Senate Hart Office Building
Washington DC 20510

FOR THE RECORD!!

As a taxpayer and a member of the Association of Business and Professional Women in Construction, I am outraged at the exclusion of women in the Surface Transportation Act.

According to the Select Committee on Minority and Women-Owned Businesses conducted in Pennsylvania (November 1984), and I quote: "less than one percent" of the 4.9 million dollar state contracts were awarded to businesses headed by women.

Two percent is only one-fifth of the minoritys' participation goal. So women=owned businesses received $ 400,000.00 compared to the minoritys' 2 million dollars, on the same 20 million dollar contract. This is yet another form of discrimination established by "the old boys club".

Surely, Senate Public Works Committee, you have conducted surveys, you have statisics on the amount of women-owned businesses that exist. From your statisics complied, you should be aware of the "minority disadvantage" that women-owned businesses actually are up against.

Minority-owned businesses far out-number women-owned businesses in the contracting field. From your statisics, you should realize that the participation goals should be reversed, because women-owned businesses are far more a "minority" and are at the disadvantage in the "mans'" world.

This is America, who takes steps to help her "minorities", not hurt them. Looking forward to having this discriminatory situation justified for the better of women-owned businesses now and future women-owned businesses.

Sincerely,

Judith L. Kress

PSI

**PAVEMENT**
**SPECIALISTS INCORPORATED**
*Mailing Address:* P.O. BOX 610327 — D/FW AIRPORT, TEXAS 75261-0327
*Shipping Address:* 4405 REESE DRIVE — SR 114 @ ESTERS BLVD. SOUTH
IRVING, TEXAS 75063 AC 214 258-0660

December 13, 1985

The Honorable Lloyd Bentsen
United States Senator
SH-703
Washington, DC 20510

Dear Senator Bentson:

On January 6, 1983, President Reagan signed into law the Surface Transportation Assistance Act of 1982, providing an increase in the federal-aid highway construction by increasing the gasoline tax by 5¢ a gallon. It included a provision (Section 105(f)) requiring that except to the extent the Secretary of Transportation determines otherwise, not less than 10% of the fund authorized by the Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged persons (DBEs). By this Act, Congress and the President increased the federal-aid road and bridge construction program from about $8 billion to about $12 billion. At the same time they required more than double the disadvantaged business enterprise participation.

There have been numerous newspaper articles on fraud in the DBE program. Recently, nine contractors were indicted in New Mexico. Contractors have also been indicted in Georgia. In Pennsylvania, there is a new "DBE Fraud Law." The reporters, and the prosecutors, are under the impression the white contractors are stealing "lucrative" contracts from minority contractors.

In truth, fraud exists because:

(1) Congress more than doubled required DBE participation overnight without any evidence that there were sufficient qualified firms to do the work;

(2) Secretary Dole made the issue political by requiring governors to sign or concur in the request for a goal of less than 10%;

(3) Governors are afraid of being labeled racists if they request a goal of less than 10% and have told state highway and transportation commissioners to meet the 10% goal;

(4) State highway departments set goals for specific

contracts the know are impossible to meet with legitimate DBE firms and they set goals based on the assumption that all "specialty" subcontract work (guardrail, signs, seeding, traffic safety, hauling, sawing and sealing) will be done by DBEs; and

(5) Most legitimate DBE firms do not presently have sufficient highway construction experience or resources to perform the work.

The net result is a follows:

(1) In order to survive (get work), prime contractors (those who deal directly with the state) are forced to meet unrealistic goals by dealing with shams and brokers.

(2) Because almost all of the specialty subcontractors are going to disadvantaged firms, non-minority subcontractors have either been forced out of business or forced to work for shams and brokers;

(3) The greater the variance between goal and the capacity of the legitimate minority firms, the more difficult it is for those firms to obtain work. In other words, if the disadvantaged firms have actual capacity to perform 2% of the work and the goal is set at 10%, those firms capable of performing 2% have difficulty competing with the shams and brokers created by the unrealistic goal; and

(4) The program, as administered by most states, is unconstitutional because those states do not allow a waiver if the goals for specific contracts cannot be met with qualified minority firms and because of the devastating impact of the program on the non-minority specialty subcontractors.

I believe Congress could help disadvantaged contractors and other small contractors the most by taking the millions of federal and state dollars this program is costing and making it available for business development grants, low interest loans, bonding, and training. If Congress feels goals must be set, they should force the states to determine the capacity of the minority firms for each type of work and require affirmative action be taken to increase the capacity. At the same time Congress should require the states to take affirmative action to reduce the impact of this program on non-minority subcontractors. Finally, any affirmative action program should have a sunset provision.

Sincerely yours,

Joseph A. Kurtz
Vice President

JAK/kf

Southern Illinois Contractors Association
7623 West Main Street
Belleville, Illinois 62223

STATEMENT

OF THE

SOUTHERN ILLINOIS CONTRACTORS ASSOCIATION

ON THE EXTENSION OF SECTION 105(f) OF THE
SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

TO

THE

SUBCOMMITTEE TRANSPORTATION

OF

THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

OF THE

UNITED STATES SENATE

HEARING: TUESDAY, NOVEMBER 19, 1985

WASHINGTON, D.C.

November 22, 1985

Mr. Chairman and Members of the Subcommittee:

The following statement by the Southern Illinois Contractors Association, to the Subcommittee on Transportation, United States Senate, is a summary of the SICA's posture on the Disadvantaged Business Enterprise program as authorized by Section 105(f) of the Surface Transportation Assistance Act (STAA) of 1982.

SICA is a group of 12 construction firms performing highway and bridge work in Illinois. A profile of the typical contractor member shows that they are relatively small firms, under the Small Business Administration's $17 million (averaged over three years) annual size standard. In fact, most annually gross between $5 million and $15 million. At the same time, these firms earn 90 percent of their dollar volume by performing work for the Department of Transportation. Thus, the bulk of the construction work in which SICA member firms are involved are governed by the provisions of Section 105(f) of the Act.

The members of SICA stand diametrically opposed to Section 105(f) and the inflexible nature in which it has been implemented since the inception of the STAA in 1982. The DBE provision, promoted under the guise of "affirmative action", has actually fostered blatant reverse discrimination. There can be no mistake that discrimination of all types must be resisted and that the principle of Equal Opportunity must be maintained. However, under Section 105(f), affirmative action has, in twisted fashion, been interpreted to mean preferential treatment on the basis of race, ethnic origin or gender. This is regardless of whether those members of the preferred group had ever been actual victims of discrimination and with no concern for the interests and rights of the non-minority contractors who have now found opportunities denied to them.

Ironically, this reverse discrimination has come under the presumed authority of the Civil Rights Act of 1964, the law designed to create Equal Opportunity for all.

Negative byproducts of Section 105(f) are the numerous abuses that have been fostered by the program's quotas and the manner in which the provision has been administered. The DBE provision has been detrimental to both prime and specialty subcontractors. Non-minority subcontractors, especially, have been harmed as their opportunities to compete for business have increasingly been denied. This is primarily due to the fact that the highway construction industry has not traditionally lent itself to significant numbers of subcontracts. If such were not the case, the negative impact of the DBE quotas would be far less severe. However, the result in the present context of highway construction, where 90 percent or more of a contract is typically performed by the prime contractor, is that the non-minority specialty firm is routinely being excluded.

But the deleterious aspects of Section 105(f) are not limited to the non-minority subcontracting community. Prime contractors are also being forced to subcontract work they have performed in the past with their own forces in order to meet DBE quotas. This has presented numerous problems for the prime who is forced into a subcontract by a program that does not take into consideration the actual number of legitimate qualified DBE firms available.

As a result of the zealousness of the various states to comply with the law, and the resulting prospect of prime contractors being declared non-responsive for failing to reach an unachievable 10 percent quota, primes have been forced (against their instincts and judgments) into questionable business practices by utilizing minority subs, legitimate or not. It is important to note that these "questionable" DBEs must be certified by the state Department of Transportation. In fact, recent testimony by the U.S. Department of Transportation's inspector general revealed that 40 percent of the DBE and WBE firms in eight states were actually shams, providing no commercially useful function.

The other side of this "worse case scenario" is of the legitimate DBE firms that are deluged with opportunities to bid on work, for much of which they are largely unprepared or unqualified. Human nature dictates that many of these firms will overextend their workload in relation to their capabilities. The result has been the demise of a number of DBE firms that could have, with proper training and education, eventually have competed legitimately.

The likely outcome of the use of firms that are lacking in experience or are ill-equipped to perform the work is substandard performance and a poor quality construction product.

In any case, taxpayers are being forced to foot the bill for increased costs to build and repair highways, roads and bridges because of quotas that force prime contractors to use DBEs even in situations in which non-minority subcontractors have quoted lower prices for the work. A track record of only 13 waivers being granted to contractors in Illinois from the inception of the program until June of 1985 seems to support this contention. In fact, when the DBE program was first initiated, contractors were expressly instructed not to waste their time filing waivers because none would be granted.

Two separate surveys by prominent national construction associations establishes the increased costs attributable to Section 105(f) in the range of seven to 10 percent.

The competitive bid process, for years the uncompromising standard for the construction industry in ensuring that tax monies are being spent in the most efficient and economic manner possible, has now been emasculated. Contracts (both prime and sub) are going to contractors not because of their ability to perform the work at the most reasonable cost but because of their membership to a preferred group.

To paint a rosy picture of the success of the DBE program would be contrary to reality. Intense pressure to comply with these regulations being brought to bear upon the construction industry by states claiming to be meeting federally mandated goals, have forced contractors to substantiate the effectiveness of a program that is clearly more an impediment. Figures that show a viable, functional DBE program must be viewed with a jaundiced eye.

At the same time, while it generally accepted that one of the primary intentions of Section 105(f) was to increase minority employment opportunities, the actual result has been a reduction in minority employment. Larger, more established contractors who traditionally performed the work have employed more minorities than smaller, less experienced DBE contractors.

One of the major misconceptions at work when Section 105(f) was included in the STAA was the notion that, as a result of the additional four cents provided for funding highway construction projects, sufficient funds would be available from a bigger "pie" to satisfy both minority and non-minority contractors. The fallacy upon which this argument is based is the perception of a healthy, if not thriving, construction industry. That, in fact, was not the case in 1982 and is certainly not the case today. Statistics showing the instability of our industry and detailing the enormously high failure rate of construction firms today are well known. Further misconceptions of 15 to 20 percent profit margins in the construction industry may have helped to encourage the idea of an expanding industry. In truth, profit margins are in the area of two percent, while the inherent risks for the construction employer remain quite high.

Section 105(f) of the Surface Transportation Assistance Act has also played a major role in fostering other state and local preference procurement programs. In Illinois, state agencies mandating goals and quotas up to 25 percent and municipalities requiring up to 45 percent minority and female participation have, along with Section 105(f), reduced the availability of competent DBE and WBE companies.

Proponents that claim that there are sufficient numbers of DBE contractors on state Department of Transportation certification lists obviously do not take into consideration the fact that many of these companies do not perform traditional highway work as their major source of income and are not capable of, nor competent to perform, such highway construction. That, combined with the shams and fronts that have been born out of the necessity of achieving unrealistic goals, as well as a certification procedure that provides only a cursory glance to the capabilities of prospective DBEs, refutes the arguments made by DBE program supporters.

While the Illinois Department of Transportation is currently making an effort to purge the list of certified DBEs by removing firms of obvious questionable minority status, the agency still offers no profile of the DBEs competency. The agency merely attempts to verify the ownership of a firm and has never taken responsibility for a DBE's inability to perform on a given project, even when the agency has forced a prime contractor to utilize said DBE.

An unfortunate result of Section 105(f) and all special preference programs is that such treatment makes unsuccessful minority businessmen look as though their success was handed to them by the government. This stigma becomes a burden to be borne by these minority firms when what is really needed is the freedom to compete in the marketplace on the same basis and opportunity to succeed or fail on their own merits. It is competition that both enhances performance and ensures economic viability for all contractors.

When Section 105(f) was inserted into the Surface Transportation Assistance Act in the eleventh hour in December of 1982, the input of the construction industry was not sought or obtained. There were no hearings conducted, during which the unique and useful perspectives of contractors could have been provided. The background and experience of key industry leaders could have supplied great insight into the (lack of) availability of qualified DBE firms or the time required for new minority firms to gain the necessary expertise to perform highway construction work. There was also not adequate debate in Congress to provide a thorough consideration of these questions.

Section 105(f) simply represents just another unnecessary intrusion of government into the affairs of private industry. The DBE provision may very well stand as one of the largest restrictions on free trade and it certainly is the type of needless regulatory burden that increases costs of highway construction with no apparent corresponding benefit.

The Southern Illinois Contractors Association had not foresaken efforts to involve minority businesses in the construction industry in a meaningful way when it found itself on the "outside looking in", shut out from providing suggestions to the lawmakers who were first considering the addition of Section 105(f) to the Act. A committment to DBEs was in evidence with SICA members' endeavors to gain governmental approval to enact a voluntary minority contracting plan. The plan, proposed in good faith as a workable and commendable example of volunterism in action, was virtually ignored. Instead, contractors were faced with a program of DBE quotas the effect of which is to perpetuate discrimination, not eliminate it. There appears to be no alternative left to representatives of the construction industry but to resist the threat to individual rights posed by Section 105(f).

The AGC of America has suggested that it will express support for presidential veto of the Surface Transportation Assistance Act reauthorization, now being considered by Congress, if the bill extends Section 105(f). Many SICA members support this position because they agree that the provision was ill-conceived and hastily passed.

However, SICA is confident that a logical, unemotional discussion of all the issues will result in a new piece of legislation that will uphold a time-honored principle; that open, unrestricted competition in federal construction procurement assures that a given project will be completed at the most economical cost to taxpayers. SICA is likewise convinced that Section 105(f) serves no firm that operates in legitimate fashion. The future of SICA member firms depends on a meaningful response to our concerns over Section 105(f) in the form of elimination of quota requirements.

The Southern Illinois Contractors Association expresses its thanks to the Subcommittee on Transportation, Committee on Environment and Public Works of the United States Senate for the opportunity to register our concerns about this vitally important issue.

# STATEMENT

OF THE

# STATEWIDE TRANSPORTATION ALLIANCE OF ASSOCIATIONS
(in the State of Illinois)

ON THE EXTENSION OF SECTION 105(f) OF THE
SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

TO

THE

SUBCOMMITTEE ON TRANSPORTATION

OF

THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

OF THE

UNITED STATES SENATE

TUESDAY, NOVEMBER 19, 1985

WASHINGTON, D.C.

November 19, 1985

Mr. Chairman and Members of the Subcommittee:

The Statewide Transportation Alliance of Associations (STAA) is composed of seven distinct highway contracting organizations in the State of Illinois and represents more than 300 of the contractors, both prime and sub, performing highway and bridge work in that State.

The Associations are the American Concrete Pavement Association, Associated General Contractors of Illinois, Illinois Asphalt Pavement Association, Illinois Road Builders Association, Southern Illinois Contractors Association, Underground Contractors Association and the United Subcontractors Association of Illinois.

The typical contractor represented annually grosses between $5 and $15 million with only about 5% of the firms averaging in excess of $17 million a year over a three-year period. However, these firms which do not qualify for an SBA 8(d) designation, earn 90% of their dollar volume doing work for the Department of Transportation, work which falls under the provision of 105(f) of the Surface Transportation Assistance Act of 1982.

During the past three years, contractors have found the provisions of Section 105(f) of the Surface Transportation Assistance Act of 1982 to be onerous and discriminatory.

Although the Act appears to have laudable objectives on its face, the Act, in effect, has been detrimental to both prime contractors and minority specialty contractors alike. The Act not only has cost taxpayers additional monies to build and repair the highways, roads and bridges; but has fostered an atmosphere which is destructive to the construction industry as a whole.

We believe that the arguments used to gain passage of the Act were both hollow and inaccurate. One argument used was that the Act would increase minority employment and was based on a theory that disadvantaged business enterprise (DBE) contractors primarily employ minority workers. This argument has no basis in fact.

As a matter of fact, it has been our experience that most new DBE companies have generally hired experienced non-minority individuals. The Act has caused a reduction in minority employment because the larger and more established contractors who traditionally perform the work employed more minorities than smaller DBE contractors themselves.

There is currently held a prevalent misconception that, as a result of the additional four cents provided for funding highway construction projects, sufficient funds would be available to non-minority contractors. This concept incorrectly assumes a healthy construction industry which, in fact, was not the case in 1982 and is not the case today. Statistics are readily available which show the truly unstable nature of our industry and detail the enormously high failure rate of construction firms.

Highway contractors are being forced to subcontract work they have historically performed with their own forces and to award subcontracts without regard to whether the price is the lowest available quote, or how qualified the subcontractors might be. At the same time, non-minority specialty subcontractors within the highway industry are being excluded from the only markets they have ever known.

As a result of the Surface Transportation Assistance Act of 1982, Section 105(f) has played a major role in fostering other state and local special preference procurement programs. In Illinois, State agencies mandating goals and quotas of up to 25% and municipalities requiring up to 45% minority and female participation have, along with Section 105(f), reduced the availability of competent DBE and WBE companies.

Congress should realize that the intense pressure to meet the unreasonable goals has fostered "shams" and "fronts" which provide no commercially useful function. Testimony of the U.S. Transportation Department's inspector general revealed that 48% of the DBE and WBE companies in eight states were actually fronts.

Another situation which has developed is that DBE firms have been encouraged and urged to perform work for which they were not qualified, simply to meet a goal. This procedure does not conform with the normal manner of doing business in the construction industry, but has been born out of necessity.

Most important, however, is that the competitive bidding concept has been emasculated. Contracts (both prime and sub) are being awarded to contractors not because of their ability to perform the work at the most reasonable cost, but because of their membership in a preferred group. By allowing this special preference, the taxpayers are negatively affected not only because they must pay more, but also because the work that is performed is often-times substandard.

We challenge the statistics that have been used to justify the claim that Section 105(f) is bringing legitimate DBE firms into the construction mainstream. States have claimed to be meeting the established goals, but such statements must be brought into question. Agencies have been placed in the position of being forced to prove that these preference programs are functioning as a viable part of the construction industry in order not to lose their Federal funding. The states have, in turn, passed on this "pressure" to contractors. The message to contractors that they are to substantiate the effectiveness of the DBE program is reinforced by the lack of a meaningful waiver procedure (as the DBE/WBE program has been administered over the past several years), even when evidence of good faith efforts was produced by contractors. States claim to be meeting the goals or quotas, and due to the shams and fronts, the statistics appear to show that the goals have been met.

There can be no doubt that if shams and fronts were eliminated and the practice of intimidating companies to do work which they would ordinarily not perform were to be stopped, the statistics would not be as favorable to the program.

Proponents of Section 105(f) point to the large number of contractors on the State certification lists. However, a study of these lists reveals numerous companies which do not perform traditional highway work as their major source of income and are neither capable nor competent to perform traditional highway work.

Contractors have made us aware of a number of unfortunate situations such as the following: A DBE firm received a subcontract to place barricades at a construction project. The individual running the DBE company claimed he did not have $200 to purchase batteries required to run the flashing lights. He called one of the prime contractor's principals and got the $200. This same individual shortly thereafter contacted a second principal of the prime contractor asking for $200 for batteries, but this time was rejected. In addition, the DBE was unable to fill out the required certified payroll reports and needed assistance from the prime. Each subsequent payment involved frequent reminders to submit these reports and again resulted in the prime contractor providing assistance filling out the reports. No legitimate firm can survive if it performs in this fashion.

Another case: A contractor hired a DBE trucking firm as a subcontractor. The trucking firm hired a non-minority contractor to perform most of the actual work. The first pay estimate check was made out to both the DBE sub and the non-minority sub. The non-minority sub endorsed the check and gave it to the DBE sub. The DBE sub promptly cashed the check but did not pay the non-minority sub. This non-payment situation also occurred at other times during the project. The DBE company has been certified and has quoted on jobs in excess of $500,000, yet they have been untrustworthy when it comes to paying their subs and completing required forms.

Similar stories of unpaid bills, unpaid employees, and substandard work are rampant throughout the country.

The Act assumes that all minority and otherwise disadvantaged individuals cannot "make it" in the construction industry without preference programs. The question becomes: When does affirmative action turn into affirmative discrimination?

There have been preference programs in the construction industry since the 1970's and the Act of 1982 increased the program goals from about 2% to 10%. The current program, when it expires, will have been in existence four years and its laudable objectives of affirmative action have now evolved into a demeaning situation whereby some contractors are discriminated against while others are being treated as if they cannot succeed on their own abilities.

The Illinois Alliance opposes all special preferences procurement programs which restrict the open, unrestricted competitive bid system and provide preferences in the awarding of construction contracts based on criteria irrelevant to the performance of the contract. Construction programs by Federal, State and local governments which offer special preferences to businesses undermine this system and result in increased costs to taxpayers and discrimination.

We urge Congress to pass a Surface Transportation Bill with no preferences.

The open, competitive bidding system that has been prevalent in the highway and bridge construction industry for several years has given this country the best finished product available at the most reasonable cost. We find it shocking that discrimination against non-minority contractors is exactly what was intended by this provision. (This written statement has been made by a member of the House of Representatives who is one of the sponsors of the Surface Transportation and Uniform Relocation Assistance Act of 1985). Ironically, this discrimination comes under the presumed authority of the Civil Rights Act of 1964, the law designed to create Equal Opportunity. We must return to realism and eliminate this discrimination from our highway and bridge programs and give everyone in construction an equal opportunity.

We thank the Subcommittee on Transportation of the Committee on Environment and Public Works of the United States Senate for the opportunity to express our grave concerns on this subject. We stand willing to provide additional testimony or assistance in the future.